No. 91-159-CFX
Status: GRANTED

Title: William Barnhill, Petitioner
v.
Elliot Johnson, Trustee

Docketed:
July 26, 1991

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Franke,Emily A.

Counsel for respondent: Johnson,William P.

Entry	Date	Note	Proceedings and Orders
1	Jul 26 1991	G	Petition for writ of certiorari filed.
2	Aug 26 1991		Brief of respondent Elliot Johnson, Trustee in opposition filed.
3	Aug 28 1991		DISTRIBUTED. September 30, 1991
4	Oct 7 1991		Petition GRANTED.
			**********
5	Nov 5 1991		Record filed.
		*	Original record U.S. Court of Appeals, Tenth Circuit andU.S. District Court, Dist. of New Mexico (1 folder)
6	Nov 20 1991		SET FOR ARGUMENT TUESDAY, JANUARY 14, 1992. (2ND CASE)
7	Nov 21 1991		Joint appendix filed.
8	Nov 21 1991		Brief of petitioner William Barnhill filed.
9	Nov 27 1991		CIRCULATED.
10	Dec 26 1991	X	Brief of respondent Elliot Johnson, Trustee filed.
11	Jan 6 1992	X	Reply brief of petitioner William Barnhill filed.
12	Jan 14 1992		ARGUED.

Supreme Court, U.S.
FILED
JUL 26 1991
OFFICE OF THE CLERK

No. 91-159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE ALAN J. and MARY FRANCES ANTWEIL,
husband and wife,
HOBBS PIPE & SUPPLY, a general partnership,
and MORRIS R. ANTWEIL,
Debtors.

WILLIAM BARNHILL,
Petitioner,

v.

ELLIOT JOHNSON, Trustee,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, for purposes of establishing a voidable preference under the Bankruptcy Code, 11 U.S.C. § 547(b), when payment is by check, the effective date of transfer is the date the check is delivered to the payee or the date the check is honored by the drawee bank.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. THE COURTS ARE DIVIDED ON THE QUESTION	5
II. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT	7
A. The Need for Uniformity in Application of the Bankruptcy Code	7
B. The Need for Resolution of the Impact of the Uniform Commercial Code on the Provisions of the Bankruptcy Code	7
C. The Need for a Uniform Rule Within Section 547	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

United States Supreme Court

Begier v. Internal Revenue Service, —— U.S. ——, 110 S.Ct. 2258, 2262 (1990) 5

McKenzie v. Irving Trust Co., 323 U.S. 365, 369-70 (1945) 7

United States Court of Appeals

Bernstein v. RJL Leasing (In re White River Corp.), 799 F.2d 631 (10th Cir. 1986) 5, 9

Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems), 932 F.2d 338 (4th Cir. 1991) 6

Fitzpatrick v. Philco Finance Corp., 491 F.2d 1288 (7th Cir. 1974) 6

In re New York City Shoes, Inc., 880 F.2d 679, 681 n.2 (3rd Cir. 1989) 6

Johnson v. Barnhill (In re Antweil), 931 F.2d 689 (10th Cir. 1991) 1, 5, 6, 7

Kroh Brothers Development Company v. Continental Construction Engineers, Inc. (In re Kroh Brothers Development), 930 F.2d 648, 650-51 (8th Cir. 1991) 6

Nicholson v. First Investment Co., 705 F.2d 410 (11th Cir. 1983) 6

Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.), 909 F.2d 879 (1990) 6, 8

Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.), 797 F.2d 790 (1986), *cert. denied*, 479 U.S. 1054 (1987) 6

United States District Court

Johnson v. Barnhill (In re Antweil), 111 Bankr. 337 (D.N.M. 1990) 5

United States Bankruptcy Court

Johnson v. Barnhill (In re Antweil), 97 Bankr. 69 (Bankr. D.N.M. 1989) 4

TABLE OF AUTHORITIES—Continued

STATUTES — Page

11 U.S.C. § 101(54) 3, 8

11 U.S.C. § 547 8

11 U.S.C. § 547(b) 2, 5, 6, 7, 9, 10

11 U.S.C. § 547(c) 5, 8, 9

28 U.S.C. § 1334 4

28 U.S.C. § 157 4

Uniform Commercial Code

U.C.C. § 3-409 7

U.C.C. § 3-503 ..... 8, 9

Law Review

64 Am. Bankr. L.J. 93 (1990) 6

Legislative History

124 Cong. Rec. H11, 097 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards) 8

124 Cong. Rec. S17, 414 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini) 8

H.R. No. 595, 95th Cong., 2d Sess. 372, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6328 8

H.R. No. 95-595, 95th Cong., 1st Sess. 373-74 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6329 8

S. Rep. No. 989, 95th Cong., 2d Sess. 88, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5874 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ——

IN RE ALAN J. and MARY FRANCES ANTWEIL,
husband and wife,
HOBBS PIPE & SUPPLY, a general partnership,
and MORRIS R. ANTWEIL,
Debtors.

WILLIAM BARNHILL,
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v.

ELLIOT JOHNSON, Trustee,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The April 30, 1991 opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir. 1991), and is reprinted in Appendix A to this Petition. The prior opinion of the United States District Court for the District of New Mexico is reported at *Johnson v. Barn-*

hill (In re Antweil), 111 Bankr. 337 (D.N.M. 1990), and is also reprinted in Appendix B. The prior opinion of the United States Bankruptcy Court for the District of New Mexico is reported at *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69 (Bankr. D.N.M. 1989), and is reprinted in Appendix C.

JURISDICTION

The Judgment of the Court of Appeals was entered April 30, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Bankruptcy Code, 11 U.S.C. § 547(b) and 11 U.S.C. § 101(54), which provide as follows:

11 USC § 547

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The full text of 11 U.S.C. § 547 is set out in Appendix D to this Petition.

11 U.S.C. § 101

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

STATEMENT OF THE CASE

Alan J. and Mary Frances Antweil, Hobbs Pipe Supply and Morris R. Antweil, (hereinafter referred to as the "Debtors"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on February 18, 1986.

For purposes of proceedings on appeal, the parties have stipulated to the following material facts:

1. Debtors or their agents delivered a check in the amount of $157,149.22 to Petitioner. William Barnhill, or his agents on November 18, 1985;

2. The check was dated November 19, 1985;

3. The drawee bank honored the check on November 20, 1985;

4. The 90th day before the bankruptcy petition was filed was November 20, 1985.

The Respondent Trustee, Elliot Johnson, was appointed on May 15, 1986. On May 12, 1988, the Trustee filed an

adversary proceeding against several parties, including the Petitioner, William Barnhill (hereinafter referred to as "Barnhill"). The Bankruptcy Court's jurisdiction was based on 28 U.S.C. § 1334 and 28 U.S.C. § 157.

The Trustee's Complaint contained in Count I an allegation that Barnhill received a preferential transfer from the Debtors on November 19, 1985. Barnhill filed a Motion to Dismiss the Trustee's Complaint on June 17, 1988. On or about October 6, 1988, the Trustee filed a First Amended Complaint against Barnhill and others, which did not change the material allegations against Barnhill.

On October 13, 1988, Barnhill filed a Motion to Dismiss the First Amended Complaint on the grounds that the transfer did not occur within the ninety day preference period under 11 U.S.C. § 547. A Motion for leave to file a second amended Complaint to recover preferential transfers was filed by the Trustee on or about October 11, 1988. On October 13, 1988, Barnhill filed a Memorandum Brief in opposition to the Trustee's Motion for leave to file second Amended Complaint.

In a Memorandum Opinion issued by the Bankruptcy Court on March 1, 1989, the Court adopted the rule that for purposes of Section 547(b), the effective date of transfer was the date of delivery of the check. *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69, 70 (Bankr. D.N.M. 1989). The Bankruptcy Court found that the date on the check and the date the check was delivered were both outside the 90-day preference period and, therefore, the Trustee could not avoid the transfer. 97 Bankr. at 70. The Bankruptcy Court granted Barnhill's Motion to Dismiss and denied the Trustee's Motion for leave to file the proposed Second Amended Complaint. 97 Bankr. at 70.

On March 10, 1989, the Trustee appealed to the District Court from the Bankruptcy Court's March 1, 1989 decision. Following briefing and argument, on February 27, 1990, the District Court entered its Memorandum

Opinion and Order affirming the decision of the Bankruptcy Court. *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337 (D.N.M. 1990).

The Trustee filed a Notice of Appeal to the United States Court of Appeals on March 28, 1990. The Court of Appeals, in its opinion of April 30, 1991, reversed the decision of the District Court, holding that, for purposes of 11 U.S.C. § 547(b), a payment made by check is deemed to have occurred when the check is honored by the drawee bank. 931 F.2d 689, 695. The Tenth Circuit found that its prior ruling in *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986), which adopted a date of delivery rule for purposes of Section 547(c), did not control the result in this case, and that a different, date of honor rule should apply to determine the date of transfer under Section 547(b).

REASONS FOR GRANTING THE WRIT

I. THE COURTS ARE DIVIDED ON THE QUESTION

Congress enacted the Bankruptcy Code in 1978, restructuring bankruptcy law and creating a uniform federal statutory structure for debtor relief. A central policy of the Bankruptcy Code is equality of distribution among creditors of equal priority. In furtherance of that policy, 11 U.S.C. § 547(b) provides that a trustee in bankruptcy may avoid certain preferential transfers of an interest in property of the debtor made within 90 days of filing of the bankruptcy petition. *Begier v. Internal Revenue Service*, —— U.S. ——, 110 S.Ct. 2258, 2262 (1990).

The question presented by this case is a question of federal law involving the provisions of § 547(b). The United States Courts of Appeals which have considered the question have rendered conflicting decisions.

The United States Courts of Appeals for the Fourth, Sixth and Ninth Circuits have held that the date of delivery of a check is the date of transfer of an interest

in property of the debtor for purposes of Section 547(b). *Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems)*, 932 F.2d 338 (4th Cir. 1991); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879 (1990); *Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790 (1986), *cert. denied*, 479 U.S. 1054 (1987).

The United States Court of Appeals for the Tenth Circuit in its decision in this case adopted the rule that transfer by check occurs on the date the check is honored by the drawee bank for purposes of establishing a voidable preference under Section 547(b). In cases decided under the former Bankruptcy Act, the Courts of Appeals for the Eleventh and Seventh Circuits have also decided to adopt a date of honor rule. *Nicholson v. First Investment Co.*, 705 F.2d 410 (11th Cir. 1983); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288 (7th Cir. 1974). The Eighth and Third Circuits have additionally indicated, in dicta, that they would apply a date of honor rule. *Kroh Brothers Development Company v. Continental Construction Engineers, Inc. (In re Kroh Brothers Development)*, 930 F.2d 648, 650-51 (8th Cir. 1991); *In re New York City Shoes, Inc.*, 880 F.2d 679, 681 n. 2 (3rd Cir. 1989).

The United States District and Bankruptcy Courts are similarly divided on the question, with the majority of those Courts holding that a date of honor rule should apply, and a minority of the Courts adopting a date of delivery rule. *See* cases cited in *Johnson v. Barnhill (In re Antweil)*, 931 F.2d at 695; *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap)*, 909 F.2d at 884; "Does Payment by Check Constitute A Transfer Upon Delivery or Payment," 64 Am. Bankr. L.J. 93 (1990).

II. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

The issue raised in this case is one which requires resolution by this Court for a number of reasons.

A. The Need for Uniformity in Application of the Bankruptcy Code

First, the conflict in decisions among the Circuit Courts of Appeals leaves unsettled the question of when a transfer occurs for purposes of § 547(b) when the transfer is made by means of a check. This question is an important one which should be resolved by this Court due to the large number of check transactions involved in most bankruptcy proceedings and due to the need for uniform application of the provisions of the Bankruptcy Code by the Federal Courts. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945).

B. The Need for Resolution of the Impact of the Uniform Commercial Code on the Provisions of the Bankruptcy Code

Second, the decision below creates a conflict between the provisions of the Bankruptcy Code and the provisions of the Uniform Commercial Code which should be settled by this Court.

In its decision, the Tenth Circuit relied, in part, on Section 3-409 of the Uniform Commercial Code. *Johnson*, 931 F.2d at 693-94. Section 3-409 states that a check does not operate as an assignment of funds in the hands of the drawee until the drawee accepts the check. The Tenth Circuit reasoned that a date of honor rule was more consistent with Section 3-409, since events occurring between the time of delivery and honor could prevent the transfer. 931 F.2d at 693. The Tenth Circuit decision, then requires that the transfer be absolute and unconditional, where payment is made by check.

In enacting Section 547 of the Bankruptcy Code, Congress intended to make that section more consistent with the Uniform Commercial Code. H.R. No. 595, 95th Cong., 2d Sess. 372, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6238. However, the clear language of Section 101(54) of the Bankruptcy Code defines "transfer" to mean every mode, absolute or conditional, of disposing of an interest in property. The adoption of a date of honor rule based on the provisions of U.S.C. § 3-409 acts as a limitatin on the definition of "transfer" under the Bankruptcy Code by excluding conditional payments by check.

In addition to limiting the definition of "transfer," a date of honor rule based on U.C.C. § 3-409 is also contrary to the expressed intent of Congress in enacting Section 547 of the Bankruptcy Code. In discussing the provisions of 11 U.S.C. § 547(c), Congress recognized modern commercial practice that payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of Sections 547(c)(1) and (2). 124 Cong. Rec. S17, 414 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 Cong. Rec. H11, 097 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

Treatment of payment by check as a cash transaction [1] unless the check is dishonored is consistent with § 3-503 of the Uniform Commercial Code, which provides that presentment of the check for payment within 30 days is reasonable time for presentment. Congress relied on

[1] A sub-issue present in this case is the question of the effect of post-dating the check. Authorities are split as to the effective date of a post-dated check. *Compare*, H.R. No. 95-595, 95th Cong., 1st Sess. 373-74 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6329 (postdated check constitutes payment on delivery if it amounts to transfer that is "substantially contemporaneous"), with *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 883 (6th Cir. 1990) (postdated check is a credit transaction).

U.C.C. § 3-503 in resolving whether the delay between delivery and payment would defeat the parties' intent of a substantially contemporaneous exchange under 11 U.S.C. § 547(c). S.Rep. No. 989, 95th Cong. 2d Sess. 88, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5874.

The issue raised by the Tenth Circuit's decision of the impact of the Uniform Commercial Code on the voidable preference provision of the Bankruptcy Code is an unsettled issue which should be resolved by this Court.

C. The Need for a Uniform Rule Within Section 547

Last, the decision below expressly creates a different rule for the effective date of transfer for purposes of Section 547(b) than for purposes of Section 547(c) of the Bankruptcy Code.

Section 547(b) of the Code sets out the power of the trustee to avoid preferential transfers within 90 days of filing of the bankruptcy petition. The companion provisions of § 547(c) define certain classes of transfers which are excepted from the trustee's avoidance powers under § 547(b). The Legislative history of the 1978 Bankruptcy Code indicates that the primary purpose of Section 547(b) was to equalize distributions among creditors of equal priority, while the primary purpose of Section 547(c) was to encourage certain creditors to continue dealing with troubled businesses without fear of the trustee's avoidance power.

Based on clear Congressional intent that a date of delivery rule should apply, the courts, including the Tenth Circuit, have uniformly adopted that rule as the effective date of transfer by check for purposes of § 547(c). *See Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986). However, finding that different policy considerations apply to § 547(b), the Court below concluded that the opposite, date of honor, rule should determine the date of transfer under § 547(b).

The result of adopting different rules for the two provisions of § 547 by the Tenth Circuit, as well as the Eighth and Third Circuits, is that two different dates of transfer for payments by check will apply in any preference action involving the two provisions.

CONCLUSION

Three important reasons exist for this Court to resolve the question presented in this case. First, the United States Courts of Appeals have divided on the question, resulting in lack of uniform application of the preference provision of the Bankruptcy Code. Second, conflicts exist between the clear language of the Bankrupcty Code, which defines the term "transfer," Legislative history indicating that the preference provision was intended to be more consistent with the Uniform Commercial Code, and the decision below which effectively re-defines the term "transfer" based on the Uniform Commercial Code. Last, adopting inconsistent rules governing the date of transfer when payment is by check for purposes of Sections 547(b) and 547(c) will result in two different dates of transfer in any preference action involving both provisions of the Code.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX
TABLE OF CONTENTS

APPENDIX A — Page

Elliott Johnson, Trustee vs. William Barnhill, et al. (In re Antweil), United States Court of Appeals for the Tenth Circuit, No. 90-2065 (April 30, 1991) 1a

APPENDIX B

Elliott Johnson vs. William Barnhill (In re Antweil), United States District Court for the District of New Mexico CIV No. 89-0316-JP (February 27, 1990) 13a

APPENDIX C

Elliott Johnson, Trustee vs. William Barnhill, et al. (In re Antweil), United States Bankruptcy Court for the District of New Mexico No. 11-86-00254 MA, Adversary No. 88-0136 M (March 1, 1989) 24a

APPENDIX D

11 U.S.C. § 547 ..... 29a

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-2065

IN RE ALAN J. and MARY FRANCES ANTWEIL, husband and wife; HOBBS PIPE & SUPPLY, a general partnership; and MORRIS R. ANTWEIL,
Debtors.

ELLIOTT JOHNSON, Trustee,
Plaintiff-Appellant,
v.

WILLIAM BARNHILL; BRAVO ENERGY; and ESTATE OF MURRAY CASH,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CV 89-316JP)

[Filed Apr. 30, 1991]

Submitted on the briefs:

William P. Johnson and Andrew J. Cloutier of Hinkle, Cox, Eaton, Coffield & Hensley, Roswell, New Mexico, for Plaintiff-Appellant.

William J. Arland and Emily A. Franke of Butt, Thornton & Baehr, P.C., Albuquerque, New Mexico, for Defendants-Appellees.

Before McKAY, SEYMOUR, and EBEL, Circuit Judges.

McKAY, Circuit Judge.

The parties agree to waive oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1.2. The case is therefore ordered submitted on the briefs.

This case requires us to decide whether, for purposes of establishing a voidable preference under the Bankruptcy Code, 11 U.S.C. § 547(b), the transfer of a check occurs when the check is delivered to the payee or when it is honored by the drawee bank. Because we hold that, for purposes of section 547(b), a payment made by check is deemed to have occurred when the check is honored by the drawee bank, we reverse the district court.

The parties do not dispute the facts of this case. The debtors, Alan J. and Mary Frances Antweil, Hobbs Pipe and Supply, and Morris R. Antweil ("debtors") filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code on February 18, 1986. On May 12, 1988, the trustee filed an adversary proceeding against William Barnhill, Bravo Energy Inc., the Estate of Murray Cash, and the Estate of Sol Litt IV (collectively "Barnhill") attempting to recover an alleged preferential transfer under section 547(b) of the Code. The trustee is attempting to recover a sum paid to Barnhill by a check from the debtor dated November 19, 1985. On October 11, 1988, the trustee moved to file a second amended complaint alleging that the debtor delivered the check to Barnhill on November 18, but postdated it to November 19. The drawee bank honored the check on November 20. Barnhill objected to the trustee's request to amend and moved for dismissal.

The 90-day preference period began on November 20. The bankruptcy court held that the transfer occurred on the date the check was delivered, November 18. Thus, the bankruptcy court granted Barnhill's motion to dismiss and denied the trustee's motion to amend the complaint. *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69 (Bankr. D.N.M. 1989). The United States District Court for the District of New Mexico affirmed the decision of the bankruptcy court, *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337 (D.N.M. 1990), and this appeal followed.

In reviewing this decision, the court applies the same standard of review as that used by the district court. *See, e.g., Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543, (10th Cir. 1988). The question of the sufficiency of a complaint is a question of law reviewed *de novo*. *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986).

In pertinent part, the Bankruptcy Code allows a trustee to avoid a transfer made to a creditor by the debtor if: (a) the transfer was made to or for the benefit of a creditor; (b) it was for or on account of an antecedent debt owed by the debtor before such transfer was made; (c) it was made while the debtor was insolvent; (d) it was made on or within the 90-day period prior to the filing of the bankruptcy petition; and (e) the transfer enabled the creditor to receive more than he would have otherwise received from the bankruptcy estate. 11 U.S.C. § 547(b).

The only issue in dispute here is whether the transfer by check occurred on or within the 90-day period prior to the filing of the petition. "What constitutes a 'transfer' under § 547(b) and when it is complete . . . is necessarily a federal question, since it arises under a federal statute designed to have uniform application . . . ." *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945). The parties agree that any transfer taking place on or

after November 20, 1985, falls within the 90-day preference period.

I. THE DISTINCTION BETWEEN 547(b) AND 547(c)

We previously held in another context that a transfer occurs on the date a check is delivered. *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986). *In re White River* applies to section 547(c)(2),[1] the "ordinary course of business" exception to the preference provision. However, because the purpose and function of section 547(b) differ from those of section 547(c), *In re White River* and the legislative history upon which it relies[2] do not govern here. *See, e.g., In re New York City Shoes, Inc.*, 880 F.2d 679, 681 n.2 (3d Cir. 1989) (because purposes of sections 547(b) and 547(c) are completely different, definition of "transfer" need not be same for both sections); *Newton Exploration Co. v. Fredman (In re Nucorp Energy, Inc.)*,

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[1] That section states:

> The trustee may not avoid under this section a transfer . . . to the extent that such transfer was (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms . . . .

11 U.S.C. 546(c)(2) (1988).

[2] In support of our holding in *In re White River*, we relied on the legislative history of subsections 547(c)(1) and (2), in particular the statements of Senator DeConcini and Representative Edwards:

> Contrary to the language contained in the house report, payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of section 547(c)(1) and (2).

In re White River, 799 F.2d at 633 (quoting 124 Cong. Rec. H11097 (daily ed. Sept. 28, 1978); 125 Cong. Rec. S17414 (daily ed. Oct. 6, 1978)).

92 Bankr. 416, 417 (Bankr. 9th Cir. 1988); *Gold Coast Seed Co. v. Spokane Seed Co. (In re Gold Coast Seed Co.)*, 30 Bankr. 551, 553 (Bankr. 9th Cir. 1983); *Bonapfel v. LaSalle-Deitch Co. (In re All American of Ashburn, Inc.)*, 95 Bankr. 251, 252-53 (Bankr. N.D. Ga. 1989); *TMWC, Inc. v. General Elec. (In re AMWC, Inc.)*, 94 Bankr. 428, 432 (Bankr. N.D. Tex. 1988); *Laird v. Bartolameolli (In re Newman Cor.)*, 83 Bankr. 571, 572 (Bankr. E.D. Wis. 1988); *Chaitman v. Paisano Automotive Liquids, Inc. (In re Almarc Mfg., Inc.)*, 62 Bankr. 684, 687 (Bankr. N.D. Ill. 1986); *Lancaster v. Morristown Block & Concrete Products (In re Compton)*, 55 Bankr. 180, 182-83 (Bankr. E.D. Tenn. 1985). *See also* 4 Collier on Bankruptcy ¶ 547.16 at 547-71 n.27 (15th ed. 1990) (check not necessarily transferred at same time under subsections (b) and (c)(1) of section 547).

The most important purpose of section 547(b) is to facilitate equal distribution of the debtor's assets among the creditors. H.R. Rep. No. 595, 95th Cong., 1st Sess. 177-78, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6138. To accomplish this purpose, Congress has created an arbitrary time period consisting of the 90 days immediately preceding the filing of the bankruptcy petition. 11 U.S.C. § 547(b)(4)(A). Creditors who receive payments on pre-existing debts before this time period begins may keep those payments. However, creditors who receive payments on pre-existing debts within the 90-day period must disgorge those payments so that they may be shared equally with other creditors. In a preference action, "the . . . contest . . . is one between [the transferee] on the one hand, and all of the debtors' unsecured creditors on the other." *Yellowhouse Machinery Co. v. Mack (In re Hughes)*, 704 F.2d 820, 822 (5th Cir. 1983).

The general rules governing preferences are objective and technical. The intent or state of mind of the parties

to a transfer is not material to the general question of whether that transfer is a preference. 4 Collier on Bankruptcy, ¶ 547.01 at 547-12. The district court incorrectly reasoned that a date of delivery rule would effectuate the commercial expectations of the parties to the transfer. However, effectuating the commercial expectations of the parties is simply not a stated goal of the general preference provision, section 547(b). Nor will protecting the expectations of the parties advance the goals of section 547(b) in any way. *In re Nucorp*, 92 Bankr. at 418.

Rather, section 547(b) "is intended to promote the common good of *all* of an estate's creditors . . . ." *In re* Hughes, 704 F.2d at 822 (emphasis in original). The creditors who receive preferential payments are those who extended credit without structuring the transactions to protect themselves against possible bankruptcy. Payment on these debts usually is not made with an eye toward a possible bankruptcy filing 90 days in the future. Thus, the intent of the parties as to when the transfer is deemed completed is irrelevant.

By contrast, the section 547(c) defenses carve out a group of exceptions to 547(b). The purpose of the section 547(c) defenses is to encourage trade creditors and other suppliers of goods and services to continue dealing with troubled businesses without fear of the trustee's avoidance powers. *In re White River*, 799 F.2d at 634. In order to do this, it is important to protect the ordinary commercial expectations of the parties.

For example, section 547(c)(1) prohibits the trustee from avoiding a transfer "intended by the debtor and the creditor . . . to be a contemporaneous exchange for new value given to the debtor," and which is, in fact, substantially contemporaneous. The purchase of goods or services for cash falls within this exception. In this context, it is important to consider that most people view the giving of a check as a cash transaction. A date of delivery rule for a check given as a contemporaneous

exchange for new value conforms to popular expectations and to the legislative history of this section quoted above. The legislative history makes clear, however, that this is an exception to the general rule:

> The first [547(c)] exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. *Normally, a check is a credit transaction.* However, for the purposes of this paragraph, a transfer involving a check is considered to be contemporaneous," and if the check is presented for payment within the normal course of affairs . . . that will amount to a transfer that is "in fact substantially contemporaneous."

H.R. Rep. No. 595, 95th Cong. 1st Sess. 373, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6329 (emphasis added).

Similarly, section 547(c)(2) states that a trustee may not avoid a "payment of a debt incurred by the debtor in the ordinary course of business . . . and made according to ordinary business terms." Under this section, a power company, for example, may continue to supply a financially troubled company on condition that the company continue to make regular and timely payments. In order to fit within this exception, a creditor must insist on "timeliness." The intent of a creditor as to when a transfer takes place should be considered for purposes of this defense.

It does not follow, however, that, because a date of delivery rule better serves the purposes of the section 547(c) defenses, such a rule should apply in all preference actions. Because, as we have discussed, a date of honor rule is consistent with the purposes of section 547(b), and because a date of honor rule is more consistent with the Uniform Commercial Code and with judicial

economy, we believe a date of honor rule should apply for purposes of section 547(b).

II. CONFORMITY WITH THE U.C.C.

The legislative history of the Bankruptcy Code states that one purpose of the 1978 reforms was to make bankruptcy law generally more congruent with modern commercial practices, in particular the Uniform Commercial Code. H.R. No. 595, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 5966. Conformity with the Uniform Commercial Code was a particular goal of the revision of the preference provision. The legislative history states:

> This section [547] is a substantial modification of present law. It modernizes the preference provisions and brings them more into conformity with commercial practice and the Uniform Commercial Code.

Id. at 372, U.S. Code Cong. & Admin. News at 6328. Furthermore, though the question of when a transfer is complete is a federal question, when there is no controlling federal statute "[t]he state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected." *McKenzie*, 323 U.S. at 369-70. While the legislative history indicates that, for purposes of the § 547(c) defenses, Congress intended a transfer to be complete when a check is delivered, *see In re White River*, 799 F.2d at 633; *Official Unsecured Creditors' Comm. of Belknap, Inc. (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990), Congress has remained silent as to when a transfer occurs for § 547(b). Thus, we refer to the U.C.C., which has been virtually unanimously adopted by the states, when formulating our answer.

The U.C.C. article governing commercial paper states in pertinent part, "A check or other draft does not of

itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." U.C.C. § 3-409(1), 2 U.L.A. 176 (1968).[3] Under this provision, no transfer of funds takes place when a check is given. *Accord Klein v. Tabatchnick*, 610 F.2d 1043, 1049 (2d Cir. 1979) (check is merely request to drawee bank to pay funds to payee, not an assignment of funds); M. Bienenstock, *Bankruptcy Reorganization* 389 (1987) (uncertified check is not transfer of funds). As the Eleventh Circuit pointed out, until a check is actually accepted and paid by the drawee bank, another creditor could, for example, prevent the transfer by garnishing the bank account. *Nicholson v. First Inv. Co.*, 705 F.2d 410, 413 (11th Cir. 1983). Likewise, a drawer could stop payment or have insufficient funds. The giving of a check does not ensure that a transfer will ever, in fact, be made. Thus, our holding that, for purposes of section 547(b), a transfer does not occur until the drawee bank honors

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[3] Some courts have erroneously applied section 547(e) to determine when a check is transferred. *See, e.g., McClendon v. Cal-Wood Door (In re Wadsworth Bldg. Components, Inc.)*, 711 F.2d 122, 123 (9th Cir. 1983). Section 547(e) states in pertinent part: "For the purposes of this section . . . a transfer is made . . . at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time . . . ." 11 U.S.C. § 547(e)(2)(A) (1988). The argument is that the honoring of a check by the drawee bank is analogous to perfection. Therefore, if the check is honored within 10 days of execution, the transfer is deemed made when the check is delivered. *See* 4 Collier on Bankruptcy ¶ 547.16 at 547-72; *In re Wadsworth*, 711 F.2d at 123.

We reject this reasoning because section 547(e) deals with security interests, not checks. *See* H. Rep. No. 595, 95th Cong., 2d Sess. 374-75, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6330-31; 4 Collier on Bankruptcy at 547-73; *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 38 (1st Cir. 1984). It is unnecessary and incorrect to analogize to security interests and to U.C.C. Article 9 perfection rules when U.C.C. Article 3 squarely covers commercial paper such as checks.

the check is consistent with the Uniform Commercial Code.

III. EASE OF PROOF

Finally, a date of honor rule is capable of easier proof than a date of delivery rule The date of honor can usually be proven simply by producing a bank statement. By contrast, the date of delivery may not be documented. As in this case, the date of delivery may differ from the date of execution. A date of delivery rule will provide incentives to be untruthful about when delivery occurred.

In reaching this holding, we differ with the Sixth Circuit, which recently adopted a date of delivery rule both for section 547(b) general preferences and the section 547(c) defenses. *Official Unsecured Creditors' Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879 (6th Cir. 1990). The Sixth Circuit relied most heavily on the "simplicity" of having a uniform rule for all section 547 questions. *Id.* at 883. However, because the date of honor is capable of much simpler proof, we believe that it serves the interests of judicial economy to use it whenever possible. In this manner, we need only require proof of the date of delivery when a section 547 (c) defense is applicable.

To date, the circuits have split evenly on this issue. Along with the Sixth Circuit, the Ninth Circuit has held that a date of delivery rule applies under Section 547(b). *See Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790, 791 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). The Seventh and Eleventh Circuits have adopted a date of honor rule for section 547(b). *See Nicholson*, 705 F.2d at 413; *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288, 1293 (7th Cir. 1979).[4] *See also New York City Shoes*, 880 F.2d at 681

[4] Although *Nicholson* and *Fitzpatrick* were decided under the former Bankruptcy Act, nothing in the current Code suggests a different result.

n.2 (suggesting in dictum that a date of honor rule should apply). By joining the Seventh and Eleventh Circuits in adopting a date of honor rule for section 547(b), we also join the majority of bankruptcy and district courts which have decided this issue. *See, e.g., Chaitman v. Chicago Boiler Co. (In re Almarc Mfg., Inc.)*, 52 Bankr. 582, 583-84 (Bankr. N.D. Ill. 1985); *Kelley v. Citizens & Southern Nat'l Bank (In re Adams)*, 102 Bankr. 271, 273-74 (Bankr. M.D. Ga. 1989); *Putney v. Barnett Bank of Central Fla. (In re W & T Enters., Inc.)*, 84 Bankr. 838, 839 (Bankr. M.D. Fla. 1988); *In re All American of Ashburn*, 95 Bankr. at 252; *In re AMWC*, 94 Bankr. at 432; *In re Newman*, 83 Bankr. at 573; *Cimmaron Oil Co. v. Schlumberger Well Services, Inc. (In re Cimmaron Oil Co., Inc.)*, 88 Bankr. 103, 104-05 (N.D. Tex. 1987); *Tolz v. Double Envelope Corp. (In re Sunup/Sundown, Inc.)*, 65 Bankr. 696, 697 (Bankr. S.D. Fla. 1986); *In re Compton*, 55 Bankr. at 182; *LaBarge v. Tubular Steel, Inc. (In re Midwest Boiler & Erectors, Inc.)*, 54 Bankr. 793 (Bankr. E.D. Mo. 1985); *Remes v. Acme Carton Corp. (In re Fasano/Harriss Pie Co.)*, 43 Bankr. 871 (Bankr. W.D. Mich. 1984), *aff'd* 71 Bankr. 287 (W.D. Mich. 1987); *In re Video East, Inc.*, 33 Bankr. 61, 62-63 (Bankr. E.D. Pa. 1983).

IV. CONCLUSION

Because we conclude that the transfer at issue here occurred when the check was honored by the drawee bank and was thus within the 90-day voidable preference period, we REVERSE the district court and hold that the trustee may avoid the transfer.

The trustee attempted to amend his complaint to allege the three discrete dates of the transaction at issue. The bankruptcy court denied the motion to amend. The district court affirmed this denial because, having held that the transfer occurred upon delivery, any amendment of the complaint would have been futile. *In re Antweil*, 111

Bankr. at 342. Because of our disposition of this case, we also REVERSE the denial of the trustee's motion to amend.

The judgment of the United States District Court for the District of New Mexico is REVERSED, and this case is REMANDED for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

CIV No. 89-0316-JP

(Appeal from U.S. Bankruptcy Court)

IN RE: ALAN J. and MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE AND SUPPLY, a general partnership, MORRIS R. ANTWEIL,

Debtors.

ELLIOTT JOHNSON,
Plaintiff/Appellant,

vs.

WILLIAM BARNHILL,
Defendant/Appellee.

MEMORANDUM OPINION AND ORDER

[Filed Feb. 27, 1990]

The subject of this Memorandum Opinion and Order is an appeal from two orders of the United States Bankruptcy Court filed on March 1, 1989. The first order granted a motion brought by William Barnhill (appellee) to dismiss Johnson's First Amended Complaint. The second order denied a motion brought by Elliott Johnson (appellant/trustee) to file a Second Amended Complaint.[1]

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[1] Johnson additionally appealed an earlier order entered by the Bankruptcy Court on October 24, 1988. That order found that the appropriate method to count days for purposes of the 90-day pref-

Having considered the briefs and record on appeal, and having consulted the applicable authorities, I conclude that both the "Order Dismissing Defendant Barnhill" and the "Order Denying Plaintiff's Motion To File A Second Amended Complaint" should be affirmed.

BACKGROUND

The following facts were ascertained by reference to the briefs submitted by the parties and the record on appeal.

1. On February 18, 1986, Alan J. and Mary Frances Antweil, Hobbs Pipe and Supply, and Morris R. Antweil (deceased) (the "debtors") filed voluntary petitions under Chapter 11 of the Bankruptcy Code.

2. On May 15, 1986, Elliott Johnson (the "Trustee") was appointed trustee of the bankruptcy estates.

3. On May 12, 1988, Trustee filed an adversary proceeding to recover alleged preferential transfers. In Count I of his Complaint, Trustee alleged that Barnhill had received a preferential transfer in the amount of $157,149.22 in the form of a check dated November 19, 1985.

4. On June 17, 1988, Barnhill filed a Motion To Dismiss the Trustee's Complaint.

5. On October 6, 1988, Trustee filed a First Amended Complaint. The parties agree that none of the amendments contained in this complaint affected the allegations against Barnhill contained in the original complaint.

6. On October 11, 1988, Trustee filed a "Motion For Leave To File Second Amended Complaint To Recover

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erence period under 11 U.S.C. § 547(b)(4)(A) is backwards from the date of filing of a bankruptcy petition. *See Johnson v. Barnhill (In re Antweil)*, 97 B.R. 63, 64 (Bkrtcy.D.N.M. 1988). On March 27, 1989, this order was affirmed by the District Court (Burciaga, J.) (CIV 88-1313-JB) and is therefore not at issue in this appeal.

Preferential Transfers." This proposed amended complaint alleged that the check at issue "was delivered to William Barnhill and/or his agents on November 18, 1985, . . . postdated to November 19, 1985, and . . . honored by the drawee on November 20, 1985." Record On Appeal at 27.

7. On October 13, 1988, Barnhill filed a Motion To Dismiss the First Amended Complaint and an "Objection To Motion For Leave To File Second Amended Complaint To Recover Preferential Transfers."

8. On March 1, 1989, the Bankruptcy Court granted Barnhill's motion to dismiss the First Amended Complaint and denied Trustee's motion for leave to file a Second Amended Complaint. (*Johnson v. Barnhill (In re Antweil)*, 97 B.R. 69 (Bkrtcy.D.N.M. 1989)).

9. On March 10, 1989, Trustee filed a Notice of Appeal to this Court.

DISCUSSION

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a). Because this appeal presents a pure question of law, the bankruptcy court's decision will be reviewed *de novo*. *See Branding Iron Motel, Inc. v. Sandlian Equity, Inc. (In re Branding Iron Motel, Inc.)*, 798 F.2d 396, 399-400 (10th Cir. 1986) (citing *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1307 (5th Cir. 1985) (per curiam)).

The underlying issue in this appeal is the applicable date of transfer of debtors' check to Barnhill for purposes of the 90-day preference period under 11 U.S.C. § 547(b)(4)(A).[2] The parties have stipulated that

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[2] 11 U.S.C. § 547(b)(4)(A) provides in relevant part:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property . . . made . . . on or within 90 days before the date of the filing of the petition . . . .

Barnhill received the check at issue on November 18, 1985 and the check was dated and deposited on November 19, 1985. Additionally, the parties appear to agree that the drawee bank honored the check on November 20, 1985.[3]

Trustee contends the Bankruptcy Court erred by finding that the applicable date for transfer of a check under section 547(b)(4)(A) is the date of delivery rather than the date the drawee bank honors the check. Alternatively, Trustee contends the Bankruptcy Court erred by finding that this date of delivery rule also applies to postdated checks. I disagree with both of these contentions.

A. *Applicable Date of Transfer of Debtors' Check*

The Bankruptcy Court properly relied on the Tenth Circuit decision in *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986). *White River* held that, for purposes of the exception under 11 U.S.C. § 547(c)(2) to a section 547(b) preference action, a transfer occurs upon delivery of a check. *Id.* at 633. Based on *White River*, the Bankruptcy Court found "that the date of delivery rule should apply to [section]

[3] The Bankruptcy Court took judicial notice of the fact that the 90th day before the bankruptcy petition was filed was November 20, 1985. *See Antweil*, 97 B.R. at 70. Neither party has contested this finding on appeal. Thus, based on this finding, only a transfer taking place on November 20, 1985 or later would fall within the 90-day preference period established by section 547(b)(4)(A). Moreover, Trustee alleged in his Second Amended Complaint that the check was honored on November 20, 1985. For purposes of this appeal, I will therefore accept as true that the check was honored by the drawee bank on November 20, 1985. *See Shoultz v. Monfort of Colorado, Inc.*, 754 F.2d 318, 321 (10th Cir. 1985) (material allegations of complaint accepted as true for purposes of appeal (citing *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965))), *cert. denied*, 475 U.S. 1044 (1986).

547(c) defenses thereto." *Johnson v. Barnhill (In re Antweil)*, 97 B.R. 69, 70 (Bkrtcy.D.N.M. 1989).

Trustee does not contest *White River's* validity but rather contends that *White River's* date of delivery rule should be limited to section 547(c) defenses and a date of honor rule should apply to preference actions under 547(b). In support of this contention, Trustee relies on numerous authorities that hold that a date of honor rule controls for purposes of section 547(b). *See, e.g., Remes v. Acme Carton Corp. (In re Fasano/Harriss Pie Co.)*, 43 B.R. 871, 873 (Bkrtcy.W.D.Mich. 1984) (citing cases).

While acknowledging a split of authority on this issue,[4] I am nevertheless persuaded that a date of delivery rule should apply to both preference actions and defenses under section 547 of the Bankruptcy Code. First, the majority of the federal courts of appeals that have considered the section 547 transfer by check issue have applied a transfer on delivery rule. *See Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805 (5th Cir. 1989); *Durham v. Smith Metal and Iron Co. (In re Continental Commodities, Inc.)*, 841 F.2d 527, 530 (4th Cir. 1988); *Kupetz v. Elaine Monroe Associates, Inc. (In re Wolf & Vine)*, 825 F.2d 197, 201 (9th Cir. 1987); *White River*, 799 F.2d at 633; *Ray v. Security Mutual Finance Corp. (In re Arnett)*, 731 F.2d 358, 361 (6th Cir. 2984); *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 38 (1st Cir. 1984).[5] *But see Nicholson v. First Investment Co.*, 705 F2d 410, 413 (11th Cir. 1983) (applying date of honor rule for transfer of check under prior Bankruptcy Act); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288, 1293 (7th Cir. 1974) (same). Second, the Ninth Circuit, the only circuit that has to date decided the transfer

[4] *See White River*, 799 F.2d at 633 (recognizing split of authority on issue of when a transfer by check occurs).

[5] *See also Amarex, Inc. v. Marathon Oil Co. (In re Amarex, Inc.)*, 88 B.R. 362, 364-65 (W.D.Okl. 1988).

issue under section 547(b), has held that a transfer on delivery rule applies under both the 90-day preference period defined in section 547(b)(4)(A) and the within 45-day exception provided by section 547(c)(2).[6] *See Wolf & Vine*, 825 F.2d at 201.

Finally, a transfer on delivery rule under section 547(b) is in accord with much of the legislative history and policy objectives noted by the Tenth Circuit in *White River* under section 547(c). For example, *White River* cited legislative history which stated that "payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored." 799 F.2d at 633 (quoting 125 Cong.Rec. H 11097 (daily ed. Sept. 28, 1978); 125 Cong.Rec. S 17414 (daily ed. Oct. 6, 1978) (statements of Rep. Edwards and Sen. DeConcini)). *White River* further noted that "in the commercial world receipt of a check, as distinguished from the date it clears the drawee bank, is customarily looked upon as the date of payment of an obligation." *Id.* at 634. (quoting *Young Supply Co. v. McLouth Steel Corp.*, 55 B.R. 356, 357 (E.D.Mich. 1985)). The Tenth Circuit additionally rea-

[6] Trustee claims that the Ninth Circuit's position on this issue "is increasingly being questioned within that Circiut." Appellant's Reply Brief at 7. To support this claim, Trustee cites a decision of the Bankruptcy Appellate Panel of the Ninth Circuit that states that a date of delivery rule should only apply to section 547(c) defenses and not to preference actions under section 547(b). *See Newton Exploration Co., Inc. v. Fredman (In re Nucorp Energy, Inc.)* 92 B.R. 416, 417 (9th Cir.BAP 1988). As the concurring opinion in *Nucorp* points out, however, the rule proffered by the majority is dictum in that the court held that the transfer by check at issue in that case occurred within the 90-day preference period whether a date of delivery or a date of honor rule was applied. *See id.* at 419 (Perris, J., concurring). Moreover, the Ninth Circuit cases that have applied a date of delivery rule to both subsections are controlling law. *See id.* (citing *Wolf & Vine*, 825 F.2d at 201; *Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790, 791 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). For these reasons, I decline to adopt the approach proffered by the *Nucorp* court.

soned that a transfer on delivery rule would allow the debtor rather than the bank "to determine the precise date of transfer" *Id.*

Thus, much of the Tenth Circuit's rationale for a transfer on delivery rule under section 547(c) is equally applicable to preference actions as defined in section 547(b)(4)(A). I therefore decline to apply a different time of transfer rule for these two subsections of the Act.[7]

B. *Applicable Date of Transfer for Postdated Checks*

The Bankruptcy Court held that the date of delivery rule should also apply to postdated checks and defined "delivery" as "the later of the date a check is received or dated." *Antweil*, 97 B.R. at 70. In so holding, the Bankruptcy Court relied on *White River* which stated that one purpose for adopting a date of delivery rule "was to allow the debtor, as opposed to a bank, to determine the 'precise date of transfer.'" *Id.* (quoting *White River*, 799 F.2d at 634).

Trustee contends that an exception to the transfer on delivery rule should apply to checks that are postdated. Trustee urges the Court to adopt a date of honor rule for postdated checks that would make the applicable date of transfer of a postdated check for purposes of section 547(b) the date the drawee bank honors the check. Applied to the present cast, such a rule would deem debtors'

[7] The Tenth Circuit specifically conditioned the date of delivery rule to checks that are presented for payment within 30 days, the "period deemed reasonable under the U.C.C.," and that are honored upon presentment. *See White River*, 799 F.2d at 634 (quoting *O'Neill*, 729 F.2d at 38). Here, it is undisputed that the check was delivered on November 18, 1985 and deposited one day later on November 19, 1985. As previously indicated, I also accept as true that the check was honored on November 20, 1985. *See* n.3, *supra*. I find, therefore, that the time period between delivery and presentment was reasonable and that the check was honored upon presentment to the bank. The date of delivery rule should therefore apply.

check transferred on November 20, 1985, making the transfer fall within the 90-day preference period and thus subject to avoidance by Trustee.

I find Trustee's authority for application of a date of honor rule for postdated checks unpersuasive. Trustee's principal authority, *O'Donnell v. Progroup, Inc. (In re Bob Grissett Golf Shoppes, Inc.)*, 78 B.R. 787 (Bkrtcy. E.D.Va. 1987), held that, "for the purpose of section 547(c)(4), the event of a transfer occurs when a check is delievered and subsequently honored only if the parties intended to rely on the check as a cash transaction and such reliance was reasonable under the circumstances. Otherwise the transfer occurs when the check is honored." *Id.* at 792.

Grissett involved 11 postdated checks that were, except for two, all dishonored by the bank. *See id.* at 789. The *Grissett* court found that, based on the fact that the checks were postdated and intended for antecedent debt, "the parties clearly did not intend a cash transaction." *Id.* at 792. As a result, the court found that "the transfers were effective only when the checks were honored." *Id.*

Grissett, however, is factually distinguishable from the present case. First, dishonored checks are expressly excepted from application of the transfer on delivery rule by the applicable governing authorities. *See, e.g., White River*, 799 F.2d at 634 ("[a] check must be . . . honored upon presentment in order for the delivery date to be considered the time of transfer"). Second, the *Grissett* court in an earlier opinion held that a date of *honor* rule applies generally to check transfers under section 547(b). *See Grissett*, 78 B.R. at 791 (citing *Bob Grissett Golf Shoppes, Inc., v. Pro Group, Inc. (In re Bob Grissett Golf Shoppes, Inc.)*, 34 B.R. 320, 322 (Bkrtcy.E.D.Va. 1983)). Thus, I am reluctant to rely on the holding in *Grissett* since, unlike the majority of the checks involved in that case, the check at issue here was in fact honored

by the bank. Moreover, I have previously held that a date of *delivery* rather than a date of honor rule should apply generally to check transfers under section 547(c).

Nevertheless, I find that the approach adopted by the *Grissett* court is applicable to this case. A date of delivery rule for postdated checks that are subsequently honored, provided the parties intend to rely on the check as a cash transaction, is the approach taken by a number of courts and is in accord with the Tenth Circuit's policy of allowing the debtor to determine the "precise date of transfer." *White River*, 799 F.2d at 634. *See, e.g., New York City Shoes, Inc. v. Bentley International, Inc. (In re New York City Shoes, Inc.)*, 880 F.2d 679 (3d.Cir. 1989) (date of postdated check is date of delivery provided creditor can demonstrate that parties intended cash transaction);[8] *Global International Airways Corp. v. Evergreen Air Center, Inc. (In re Global International Airways Corp.)*, 80 B.R. 990, 995 n.9 (Bkrtcy.W.D.Mo. 1987) (postdated check constitutes payment on date of delivery if it amounts to transfer that is "substantially contemporaneous" (quoting H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 373-374 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6329)); *Grissett*, 78 B.R. at 792. *But see Alkap, Inc. v. John J. Demarest Supply Co., Inc. (In re Alkap, Inc.)*, 54 B.R. 151, 154 (Bkrtcy. D.N.J. 1984) (postdated check akin to promissory note

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[8] The Third Circuit in *New York City Shoes* created a presumption that postdated checks are transferred for purposes of section 547(c)(4) *either* on the date on the face of the check *or* on the date the check is honored by the bank. 880 F.2d at 679. The court further held that this presumption could be rebutted if the creditor could demonstrate that the parties intended a cash transaction. *Id.* If successfully rebutted, the court then held that a transfer on delivery rule should apply. *Id.* The court declined to resolve the question, however, of whether a postdated check will be presumed transferred on the date the check is dated or the date the check is honored if the presumption is not successfully rebutted because resolution of that issue would not have made a difference to the result in the case. *See id.* at 684.

in that both constitute mere promise to pay); *Weill v. Evans Lumber Co., Inc. (In re Johnson)*, 25 B.R. 889, 897 (Banktcy.E.D.Tenn. 1982) (creditor precluded from treating postdated check as cash payment).

It is undisputed that the check at issue here was delivered on November 18, 1985 and dated and deposited on November 19, 1985. I also accept as true that the check was honored on November 20, 1985. *See* n.3, *supra.* Thus, only one-day lapses existed between the time the check was delivered, dated and deposited, and ultimately cleared by the bank. I therefore find that the debtors' check to Barnhill was intended as a cash payment in that "the postdating did not relate to the time of intended payment, but only to the time of presentment to the bank." *Global International*, 80 B.R. at 995.

Accordingly, I find that the applicable date of transfer of the debtors' postdated check to Barnhill was the date of the delivery of the check. Although the Bankruptcy Court defined "delivery" to be the later of the date the check is received or dated, I decline to resolve this issue because both the date of receipt of the check (November 18, 1985) and the date on the face of the check (November 19, 1985) fall outside the 90-day preference period as defined in section 547(b)(4)(A).

CONCLUSION

I find that debtors' postdated check was transferred to Barnhill for purposes of section 547(b) of the Bankruptcy Code on the date it was delivered, in this case either on November 18 or November 19, 1985. Since both of these dates fall outside the 90-day preference period as defined in section 547(b)(4)(A), they are not avoidable preferences and the Bankruptcy Court's dismissal of Trustee's First Amended Complaint should therefore be affirmed.

Although amendments to complaints "shall be freely given when justice so requires," Fed.R.Civ.P. 15(a), Trustee's Second Amended Complaint also would not survive a motion to dismiss. It would therefore be futile to allow the amendment. *See Weatherhead v. Globe International, Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987) (dismissal of complaint proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief") (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The Bankruptcy Court's denial of Barnhill's motion to file a Second Amended Complaint should also be affirmed. Therefore,

IT IS BY THIS COURT ORDERED that:

(1) the "Order Dismissing Defendant Barnhill" is AFFIRMED;

(2) the "Order Denying Plaintiff's Motion To File A Second Amended Complaint" is AFFIRMED.

/s/ James A. Parker
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT 0F NEW MEXICO

Jointly administered under No. 11-86-00254 M A

IN RE ALAN J. ANTWEIL and MARY FRANCIS ANTWEIL,
HOBBS PIPE AND SUPPLY, a general partnership,
MORRIS R. ANTWEIL,
Debtors.

Adversary 88-0136 M

ELLIOTT JOHNSON, trustee,
Plaintiff,
v.
WILLIAM BARNHILL, BRAVO ENERGY, INC., and
GOLDIE CASH as personal representative of
the Estate of Murray M. Cash,
Defendants.

MEMORANDUM OPINION

[Filed Mar. 1, 1989]

This matter came before the Court for hearing on plaintiff's motion to file a second amended complaint and the objection thereto by defendant Barnhill. Having considered the arguments of counsel and the letter memoranda submitted therewith, and being otherwise fully informed, the Court finds the objection well taken.

> Although amendments to complaints should be freely permitted when justice so requires, *see* Fed.R.Civ.

> P. 15(a); *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block-Building 1 Housing Development Fund Company*, 608 F.2d 28, 41 (2d Cir. 1979), it would be an exercise in futility to allow an amendment when the new complaint would not survive a motion to dismiss. *See* J. Moore, 3 *Moore's Federal Practice* ¶ 115.08[4] (2d ed. 1985); *Freeman v. Marine Midland Bank*, 494 F.2d 1334, 1338 (2d Cir. 1974); *Vibrant Sales, Inc. v. New Body Boutique, Inc., 105 F.R.D. 553 (S.D.N.Y. 1985).*

In re Sattler's Inc., 73 B.R. 780, 785 (Bankr. S.D.N.Y. 1987).

Plaintiff's proposed second amended complaint is identical to the first, with one exception; it adds paragraph 7 to Count I against Barnhill that states:

> Alternatively, the transfer from debtors to William Barnhill was made on November 20, 1985. On information and belief, the trustee states that the check attached hereto as exhibit A was delivered to William Barnhill and/or his agents on November 18, 1985, said check was postdated to November 19, 1985, and said check was honored by the drawee on November 20, 1985.

Taking judicial notice of the file the Court finds that the 90th day before the bankruptcy petition was filed is November 20, 1985.

In an earlier order entered in this case the Court ruled that the appropriate way to count days for purposes of the 90 day preference period is backwards from the date of the petition. *Johnson v. Barnhill (In re Antweil)* Adv. No. 88-0316 M (Bankr. D. N.M. Oct. 24, 1988). That order also found the case of *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986) binding. That case states that the date of delivery of a check is the date of transfer if the check is presented for payment within 30 days and honored.

Trustee makes two arguments to support amending the complaint: first, that the date of delivery rule should not apply to post-dated checks and, second, that the date of delivery rule only applies to Bankruptcy Code § 547(c) defenses, not § 547(b) preference actions. Each will be discussed in turn.

The Court finds that the date of delivery rule should apply to post-dated checks. The date of delivery rule is the method adopted by the Court of Appeals for the Tenth Circuit to determine when a transfer made by check occurs. *In re White River*, 799 at 633. One purpose stated by the Court in adopting that rule was to allow the debtor, as opposed to a bank, to determine the "precise date of transfer." *Id.* at 634. By defining "delivery" to be the later of the date a check is received or dated will further that purpose. This interpretation will also comport with the state law treatment of post-dated checks.[1]

The Court also finds that the date of delivery rule should apply to § 547(b) preference actions as well as to § 547(c) defenses thereto. First, *White River* held that "a transfer occurs upon delivery" and rejected the argument that a transfer occurred on the date a check was honored. 799 F.2d at 633. The trustee makes the same argument in this case.

Second, the Court finds no good reason to view a single transaction differently depending on which subsection of the statute is being read. Finally, in this case the date on the check and the date the check was delievered to

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[1] Section 55-3-114 N.M.S.A. provides, in part:

(1) The negotiability of an instrument is not affected by the fact that it is undated, antedated, or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

Barnhill are both outside the 90 day preference period. This does not seem to be the type of situation Congress intended to cover when it passed section 547. *See* 124 Cong. Rec. S17414 (daily ed. Oct. 6, 1978) ("Payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored.")

Therefore, if the Court granted the plaintiff's motion to file a second amended complaint that complaint would not survive a motion to dismiss. Plaintiff's motion will be denied.

In the October 24, 1988 order entered in this case the Court granted all pending motions to dismiss except Barnhill's and reserved ruling on the Barnhill motion pending the outcome of plaintiff's motion to amend the complaint. For the reasons set forth in the October 24, 1988 order the Court now finds Barnhill's motion to dismiss well taken.

An appropriate order shall enter.

/s/ Mark B. McFeeley
MARK B. MCFEELEY
United States Bankruptcy Judge

I certify that on the above stamped date I mailed a copy of the above to:

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APPENDIX D

STATUTES INVOLVED

11 USC § 547

§ 547. Preferences.

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A) (i) with respect to a transfer to which subsection (b) (4) (A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b) (4) (B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e) (1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

Supreme Court, U.S.
FILED
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No. 91-159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE ALAN J. and MARY FRANCES ANTWEIL,
husband and wife,
HOBBS PIPE & SUPPLY, a general partnership,
and MORRIS R. ANTWEIL,
Debtors.

WILLIAM BARNHILL,
Petitioner,

v.

ELLIOT JOHNSON, Trustee,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED FOR REVIEW, OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES	Page
United States Supreme Court	
Youakim v. Miller, 425 U.S. 231 (1976)	3
McKenzie v. Irving Trust Co., 323 U.S. 365 (1945)	4
United States Court of Appeals	
Johnson v. Barnhill (In re Antweil), 931 F.2d 689 (10th Cir. 1991)	3, 4, 5
Bernstein v. RJL Leasing (In re White River Corp.), 799 F.2d 631 (10th Cir. 1986)	5
O'Neill v. Nestle Libby P.R., Inc., 729 F.2d 35 (1st Cir. 1984)	5
Kroh Brothers Development Co. v. Continental Construction Engineers (Matter of Kroh Brothers Development Co.), 930 F.2d 648 (8th Cir. 1991)	6
New York City Shoes, Inc. v. Bentley International, Inc. (In re New York City Shoes, Inc.), 880 F.2d 679 (3rd Cir. 1989)	6
United States District Court	
Johnson v. Barnhill (In re Antweil), 111 Bankr. 337 (D.N.M. 1990)	2
Gold Coast Seed Co. v. Spokane Seed Co. (In re Gold Coast Seed Co.), 30 Bankr. 551 (Bankr. 9th Cir. 1983)	6
United States Bankruptcy Court	
Johnson v. Barnhill (In re Antweil), 97 Bankr. 69 (Bankr. D.N.M. 1989)	2
In re Stattler's, Inc., 73 Bankr. 780 (Bankr. S.D.N.Y. 1987)	2
State Court	
Grist v. Osgood, 95 Nev. 165, 521 P.2d 368 (1974)	4-5
Wildman Stores, Inc. v. Carlisle Distributing Co., 15 Ark. App. 11, 688 S.W.2d 748 (1985)	5

TABLE OF AUTHORITIES—Continued

STATUTES	Page
11 U.S.C. § 547(c)	2, 5
11 U.S.C. § 547(b)	2, 3, 5
11 U.S.C. § 547	5, 6
UNIFORM COMMERCIAL CODE	
U.C.C. § 3-409(1)	4
U.C.C. § 3-502	4, 5
U.C.C. § 3-503	4, 5
SUPREME COURT RULES	
Sup. Ct. R. 10.1	3, 4
LEGISLATIVE HISTORY	
H.R. Rep. No. 595, 95th Cong., 1st Sess. 373, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963	5

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WILLIAM BARNHILL,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED FOR REVIEW, OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The Question Presented for Review, Opinions Below, Jurisdiction and Statutes Involved sections of the Petition for Writ of Certiorari (hereinafter referred to as the

"Petition") are adequate and require no clarification or further comment by Respondent.

STATEMENT OF THE CASE

Respondent believes that the recitations contained in the Statement of the Case section of the Petition are correct but incomplete.

Respondent was appointed trustee of Debtors' bankruptcy estates on May 15, 1986. A liquidating Chapter 11 plan which consolidated Debtors' bankruptcy estates was confirmed on May 16, 1988.

Petitioner's only responsive pleadings filed in the Bankruptcy Court below were motions to dismiss. Petitioner never raised any 11 U.S.C. § 547(c) defense.

In the proposed amendments to the Complaint which are the subject matter of this appeal, Respondent alleges that the check was delivered to Petitioner or his agents on November 18, 1985, dated November 19, 1985 and honored by the drawee bank on November 20, 1985. Based on prior rulings of some of the courts below, which rulings are not part of this appeal, the parties agree that November 20, 1985 is "on or within 90 days before the date of the filing of the petition" but that November 19, 1985 is outside of this 90 day period. 11 U.S.C. § 547 (b)(4)(A). Both the District and Bankruptcy Courts below correctly stated that denial of the Trustee's Motion to Amend and dismissal of his complaint (which in its unamended form alleges transfer on November 19, 1985) would be appropriate if the proposed amendments would not withstand a motion to dismiss. *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337, 342 (D.N.M. 1990); and *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69, 69 (Bankr. D.N.M. 1989) quoting *In re Stattler's, Inc.*, 73 Bankr. 780, 785 (Bankr. S.D.N.Y. 1987). Accordingly, the date a check is honored must be capable of being the date of transfer for purposes of Section 547(b)(4) for Respondent's proposed amendments to be allowed.

On appeal to the Tenth Circuit, Respondent raised three issues: (1) that transfers occurs when a check is honored by the drawee bank for purposes of Section 547(b)(4); (2) alternatively, if the date of delivery is typically the date the check is transferred under Section 547(b)(4), that the date of honor controls in cases where a check is postdated; and, (3) if the Tenth Circuit ruled in favor of Respondent on the second ground (i.e. delivery controls except in cases of postdated checks), that the District Court had improperly made a finding of fact on the issue of the parties' intent with respect to the check at issue. The Tenth Circuit reversed the lower courts under the first theory, *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir. 1991), rendering moot the remaining two issues.

If this Court both grants Writ of Certiorari and reverses the decision of the Tenth Circuit, the appropriate remedy is a remand to the Tenth Circuit for further proceedings regarding the remaining grounds for appeal. It is this Court's long standing policy to decline to review issues not addressed by the courts below absent exceptional circumstances. *See e.g. Youakim v. Miller*, 425 U.S. 231, 234 (1976). No exceptional circumstances exist. Accordingly, a ruling in favor of Petitioner should not resolve this case.

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT

The first reason enunciated by Petitioner for granting a writ for certiorari, namely that the courts are divided on a question presented, is described correctly. *See* Petition at 5-6. As Petitioner states, there are four United States Court of Appeals which clearly have resolved the question presented in the Petition and there is a direct conflict among those rulings. This Court sometimes exercises its discretion and grants writs of certiorari to resolve such conflicts. Sup. Ct. R. 10.1(a).

Petitioner's second reason is that there is a need for uniform application of provisions in the Bankruptcy Code. Petition at 7. Despite Petitioners apparent reliance on the case to the contrary, *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945), does not stand for the proposition that bankruptcy law requires uniform application, but instead is a case where this Court granted review of important questions of federal law decided by state court. *Id.* at 367. While certainly an interesting issue in the narrow field of preference litigation, the question presented in this case is not "an important question of federal law which has not, but should be, settled by this Court." Sup. Ct. R. 10.1(c).

Third, Petitioner states that "the decision below creates a conflict between the provisions of the Bankruptcy Code and the provisions of the Uniform Commercial Code." Petition at 7. Petitioner's contention is erroneous. The decision is correct. The holding that a check does not operate as a transfer of funds of the drawer until it has been honored by the drawee bank is consistent with Section 3-409(1) of the Uniform Commercial Code. 931 F.2d at 694.

Petitioner's reliance upon Section 3-503 of the Uniform Commercial Code is misplaced. Section 3-503 merely provides that presentment of a check within thirty days of the date appearing on its face is a reasonable time for presentment. That section neither provides that a check presented within thirty days of the date on the face of the check operates as an assignment of the drawer's funds as of the date appearing on the check nor guarantees that a check presented within that time frame will be honored. Section 3-503 defines what a stale check is for the payee, the drawee bank and all other intermediaries in the collection process. Presentment of a check which is stale and is dishonored can result in a discharge of liability of endorsers and, under certin circumstances, drawees by operation of Section 3-502. *Grist v. Osgood*, 90 Nev. 165,

521 P.2d 368, 368 (1974); and *Wildman Stores, Inc. v. Carlisle Distributing Co.*, 15 Ark. App. 11, 688 S.W.2d 748, 749 (1985) (both discussing the interaction between U.C.C. §§ 3-502 and 3-503).

The mention of Section 3-503 in the legislative history to Section 547 is of no moment. In the legislative history, Congress has acknowledged that its intent to adopt a transfer on delivery rule for checks under certain of the Section 547(c) defenses is contrary to the legal reality that a check does not operate as an assignment of funds until it is honored. *See, e.g., Johnson v. Barnhill, supra*, 931 F.2d at 693, quoting and discussing H.R. Rep. No. 595, 95th Cong. 1st Sess. 373, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6329.

The final reason advanced by Petitioner for granting review is to create a uniform rule of the effective date a check is transferred under all provisions of Section 547. However, there is no issue on appeal regarding Section 547(c). While there may be a *de facto* uniform rule (lower court decisions generally appear to hold that transfer occurs when a check is delivered under certain Section 547(c) defenses) if Petitioner is successful before this Court, there is no basis for ruling upon Section 547(c) in this proceeding.

Additionally, it is unlikely that any uniform rule was intended by Congress in promulgating Section 547. The decisions adopting the date of honor approach under Section 547(c) defenses typically rely upon the express legislative history or that subsection. *See, e.g., Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986); and, *O'Neill v. Nestle Libby P.R., Inc.*, 729 F.2d 35, 37 (1st Cir. 1984). As is discussed above, the legislative history clearly acknowledges that the date of delivery approach is adopted for purposes of the certain of the Section 547(c) defenses is an exception to the normal rule. Assuming that the legislative history is controlling as to certain Section 547(c) de-

fenses on this issue, the better reasoned approach is that Congress did not intend "a unitary concept" of transfer by check for the various subsections of Section 547. *Gold Coast Seed Co. v. Spokane Seed Co.* (*In re Gold Coast Seed Co.*), 30 Bankr. 551, 553 (Bankr. 9th Cir. 1983). *See also Kroh Brothers Development Co. v. Continental Construction Engineers* (*Matter of Kroh Brothers Development Co.*), 930 F.2d 648, 651 (8th Cir. 1991); and *New York City Shoes, Inc. v. Bentley International, Inc.* (*In re New York City Shoes, Inc.*), 880 F.2d 679, 681 n.2 (3rd Cir. 1989) (both noting approvingly decisions which hold that the "completely different" purposes of these subsections require different rules).

CONCLUSION

The only reason for granting a Writ of Certiorari in this case would be if this Court wishes to exercise its discretion to resolve a conflict among certain United States Court of Appeals. For reasons enunciated in its opinion, the decision of the United States Court of Appeals below was correct and does not require review.

WHEREFORE Respondent respectfully prays that a Writ of Certiorari not be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-159

In The

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v.

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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* Counsel of Record

Petition For Certiorari Filed July 26, 1991
Certiorari Granted October 7, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

RELEVANT DOCKET ENTRIES 1

RELEVANT PLEADINGS

- Complaint to Recover Preferential Transfers... 4
- Motion to Dismiss..... 16
- First Amended Complaint to Recover Preferential Transfers 19
- Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers 30
- Second Amended Complaint to Recover Preferential Transfers..... 35
- Objection to Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers 42
- Motion to Dismiss..... 45
- Order Denying Plaintiff's Motion to File a Second Amended Complaint..... 49
- Order Dismissing Defendant Barnhill 51

DECISIONS SOUGHT TO BE REVIEWED..... 53

STATUTES INVOLVED 54

RELEVANT DOCKET ENTRIES

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

In re: ALAN J. and MARY FRANCES ANTWEIL, Debtors.
No. 11-86-00254 MA

2/18/86	Voluntary Petitions for Relief under Chapter 11 of the Bankruptcy Code by Alan J. and Mary Francis Antweil, Hobbs Pipe and Supply, and Morris R. Antweil
5/15/86	Appointment of Chapter 11 Trustee, Elliott Johnson
6/03/86	Acceptance of Appointment as Trustee by Elliott Johnson
5/16/88	Order Confirming Plan of Reorganization

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

Elliott Johnson, Trustee, Plaintiff
vs. William Barnhill, et al., Defendants.
Adversary Proceeding No. 88-0136M

5/12/88	Complaint to Recover Preferential Transfers
6/17/88	Motion by William Barnhill to Dismiss Complaint
10/06/88	First Amended Complaint to Recover Preferential Transfers
10/11/88	Motion by Elliott Johnson for Leave to File Second Amended Complaint to Recover Preferential Transfers

10/11/88	Second Amended Complaint to Recover Preferential Transfers
10/13/88	William Barnhill's Objection to Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers
10/13/88	Motion by William Barnhill to Dismiss First Amended Complaint to Recover Preferential Transfers
3/01/89	Order Denying Plaintiff's Motion to File a Second Amended Complaint
3/01/89	Order Dismissing Defendant Barnhill
3/10/89	Notice of Appeal filed by Elliott Johnson appealing Orders of dismissal and denying plaintiff's Motion to file a Second Amended Complaint entered on 3/1/89

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

Elliott Johnson, Trustee, Plaintiff/Appellant,
vs. William Barnhill, Defendant/Appellee.
CIV No. 89-0316-JP

3/10/89	Notice of Bankruptcy Appeal by Plaintiff and Trustee
4/28/89	Appellant's Brief in Chief
5/12/89	Appellee's Answer Brief
5/26/89	Appellant's Reply brief
2/27/90	Memorandum Opinion and Order that: 1. Order dismissing defendant Barnhill is affirmed; and 2. Order denying plaintiff's Motion to file a Second Amended Complaint is affirmed.

3/29/90	Notice of Appeal by plaintiff/appellant of Memorandum Opinion and Order entered 2-27-90

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Elliott Johnson, Trustee, Plaintiff-Appellant, vs.
William Barnhill, Defendant-Appellee
No. 90-2065

5/8/90	Appellant's Opening Brief
6/11/90	Appellee's Answer Brief
6/25/90	Appellant's Reply Brief
4/30/91	Opinion and Order reversing the judgment of the United States District Court for the District of New Mexico

RELEVANT PLEADINGS

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE:	)	
ALAN J. and MARY FRANCES ANTWEIL,	)	
Debtors.	)	No. 11-86-00254 MA
IN RE:	)	
HOBBS PIPE AND SUPPLY, a general partnership,	)	
Debtor.	)	No. 11-86-00255 MA
IN RE:	)	
MORRIS R. ANTWEIL,	)	
Debtor.	)	No. 11-86-00257 MA

ELLIOTT JOHNSON, Trustee,	)	ALL DOCUMENTS
Plaintiff,	)	REGARDING THIS
	)	MATTER MUST BE
vs.	)	IDENTIFIED BY
	)	BOTH ADVERSARY
WILLIAM BARNHILL, BRAVO ENERGY, INC., the Estate of MURRAY M. CASH, and the Estate of SOL LITT, IV,	)	AND BANKRUPTCY
	)	CASE NUMBERS.
	)	
	)	
Defendants.	)	Adversary Proceeding
	)	No. 88-0136M

COMPLAINT TO RECOVER PREFERENTIAL TRANSFERS

(Filed May 12, 1988)

COMES NOW Elliott Johnson, the Court-appointed Chapter 11 Trustee (hereinafter "Trustee") for the above-captioned bankruptcy estates and files this adversary proceeding pursuant to §547(b) of Title 11, United States Code, and Rule 7001, Rules of Bankruptcy Procedure, and states the following:

General Allegations

1. On February 18, 1986, the Debtors filed voluntary petitions for relief thereby commencing the Chapter 11 proceedings. On May 15, 1986, Elliott Johnson was appointed as the Chapter 11 Trustee.

2. Jurisdiction herein is based upon 28 USC §1334(b) in that this case arises under Title 11, United States Code. This proceeding is a "core" proceeding under 28 USC §157(b)(2)(F) and relates to the above-captioned bankruptcy cases.

COUNT I

Against William Barnhill

3. The Trustee realleges each and every allegation made or contained in the general allegations as set forth above.

4. Defendant William Barnhill is a resident of the State of New Mexico.

5. On November 19, 1985, which is within 90 days of the date of the Petitioners having filed their voluntary petitions in bankruptcy herein, the Debtors herein, a/k/a Antweil Oil Company, transferred certain of its property to and for the benefit of the Defendant William Barnhill to pay an antecedent debt.

6. Such transfer was made when the Defendant William Barnhill received payment from Antweil Oil Company for past due invoices. Antweil Oil Company made payment by check dated November 19, 1985, in the amount of $157,148.22. A copy of said check is attached here as Exhibit A. Said copy was made pursuant to a settlement agreement reached by Debtors and Mr. Barnhill.

7. Such transfer was made while the Debtor was insolvent.

8. By virtue of such transfer, Defendant William Barnhill has recovered more than he would receive otherwise as a Creditor of a bankruptcy case if:

a. The Bankruptcy Code was a Chapter 7 case under Title 11 United States Code,

b. The transfer had not been made, and

c. Defendant William Barnhill received payment of his debt to the extent provided for the under provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against the Defendant William Barnhill to:

a. Void the transfer to Defendant William Barnhill described herein; and

b. Against Defendant William Barnhill for $157,148.22, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

COUNT II
Against Bravo Energy Company

9. The Trustee realleges each and every allegation made and contained in Paragraphs 1 and 2 as so fully set forth herein.

10. Defendant Bravo Energy, Inc., is a corporation doing business in Hobbs, New Mexico.

11. On or about December 26 and 27, 1985, which is within 90 days of the date of the Debtors having filed their voluntary petitions for bankruptcy herein, certain property of the Debtors was transferred to and for the benefit of the Defendant Bravo Energy in order to pay an antecedent debt.

12. Such transfer was made when Defendant Bravo Energy received payments as follows:

a.	12/26/85	$80,341.76
b.	12/27/85	12,694.46
	Total	$93,036.22

Copies of said checks are attached hereto as Exhibits B and C, respectively.

13. Such transfer was made while the Debtors were insolvent.

14. By virtue of such transfer, Defendant Bravo Energy will recover more than it would otherwise receive as a Creditor of the bankruptcy estate if:

a. The Bankruptcy Codes were a Chapter 7 case under Title 11 of the United States Code,

b. The transfer had not been made, and

c. Defendant Bravo Energy received payment of his debt to the

extent provided by the provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against Defendant Bravo Energy:

a. Voiding the transfer to Defendant described herein;

b. Against Defendant Bravo Energy for $93,036.22, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

COUNT III

Against the Estate of Murray M. Cash

15. The Estate of Murray M. Cash is now pending in the State of Oklahoma and its legal counsel is Rosenstein, Fist & Ringold (John E. Howland) who are attorneys practicing in Tulsa, Oklahoma.

16. On or about January 30, 1986, the Debtors transferred certain of their property to and for the benefit of

the Defendant Estate of Murray M. Cash on account of an antecedent debt.

17. Such transfer was made when Defendant Estate of Murray M. Cash received payment by check dated January 1, 1986, in the amount of $51,397.07. Said check was issued by Antweil Oil Company. A copy of such check is attached hereto as Exhibit D.

18. Such transfer was made while the Debtors were insolvent.

19. Such transfer would enable the Defendant Estate of Murray M. Cash to recover more than it would otherwise receive as a Creditor of the bankruptcy estate if:

a. The bankruptcies were cases under Chapter 7 of Title 11, United State Code;

b. The transfers had not been made; and

c. Defendant Estate of Murray M. Cash received payment of its debt to the extent provided for by the provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against the Defendant Estate of Murray M. Cash:

a. Voiding the transfer to Defendant Estate of Murray M. Cash described herein;

b. Against Defendant Estate of Murray M. Cash for $51,397.07, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

COUNT IV
Against the Estate of Sol Litt, IV

20. The Trustee realleges each and every allegation made in Paragraphs 1 and 2 above, as if the same were set forth herein.

21. The Estate of Sol Litt, IV, is now pending in the State of Texas and its legal counsel is Cas Tabor.

22. On or about November 19, 1985, which is within 90 days of the date of the filing of the voluntary petition for bankruptcies herein, the Debtors transferred certain of their property to and for the benefit of the Defendant Estate of Sol Litt, IV, on account of an antecedent debt.

23. Such transfer was made when Defendant Estate of Sol Litt, IV, received payment from Antweil Oil Company for past due oil runs. Antweil Oil Company made payment to Defendant Estate of Sol Litt, IV, by check in the amount of $6,039.00.

24. Such transfer was made while the Debtors were insolvent.

25. Such transfer will enable Defendant Estate of Sol Litt, IV, to recover more than he would have received as a Creditor of the bankruptcy estates if:

a. For a bankruptcy case under Chapter 7 of Title 11, United States code;

b. The transfer had not been made; and

c. Defendant Estate of Sol Litt, IV, had received payment of its debt to the extent provided for by the provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against Defendant Estate of Sol Litt, IV:

a. Voiding the transfer to Defendant Estate of Sol Litt, IV, described herein;

b. Against Defendant Estate of Sol Litt, IV, for $6,039.00, the amount of the preferential transfer; and

c. For Plaintiff's cost in this action and for such other and further relief as the Court may deem just and proper.

HINKLE, COX, EATON, COFFIELD
& HENSLEY

By Nancy S. Cusack
Nancy S. Cusack
William P. Johnson
P. 0. Box 10
Roswell, New Mexico 88201
(505) 622-6510

Attorneys for Elliott Johnson, Trustee

EXHIBIT A

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
ALBUQUERQUE, NEW MEXICO
95-27
1070

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
	11-19-85	**$157,148.22

PAY TO THE ORDER OF:

William Barnhill

1001131107 ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

By

"013089" :107000275: 19151095 1" "00157148 22"

95-93 PAY ANY BK. BKR. OR TR. CO.
95-93 UNITED NM. ALBUQUERQUE

UNITED
NEW MEXICO
BANK AT
ROSWELL, N.A.
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3331 2 5 2 9

95-27

ALBUQUERQUE, NM

For Deposit Only
ANTWEIL OIL COMPANY

By

BEST AVAILABLE COPY

EXHIBIT B

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
ALBUQUERQUE, NEW MEXICO
95-27
1070

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
	12-26-85	$80,341.76

PAY TO THE ORDER OF:

BRAVO ENERGY

ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

200213492

⑈013107⑈ ⑆107000275⑆ 19151095⑈ ⑈00080341 76⑈

95-93 UNITED NATIONAL BUSINESS

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UNITED BANK OF LEA COUNTY
HOBBS, NEW MEXICO
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PAY ANY BANK D.D.
FIRST NATIONAL BANK
ALBUQUERQUE, NM
6-27

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EXHIBIT C

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
ALBUQUERQUE, NEW MEXICO
95-27
1070

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
35251	12/27/85	***$12,694.46***

PAY TO THE ORDER OF:

Bravo Energy Inc.
A New Mexico Corp.
P. O. Box 758
Hobbs, NM 88241

ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

200866082

By

⑈013117⑈ ⑆107000275⑆ 69151095⑈ ⑈0001269446⑈

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PAY ANY BANK P.E.B.
FIRST NATIONAL BANK
ALBUQUERQUE, NM

95-27

FOR DEPOSIT ONLY
UNITED BANK OF LEA COUNTY
HOBBS, NEW MEXICO
BRAVO ENERGY, INC.

BEST AVAILABLE COPY

EXHIBIT D

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
HOBBS, NEW MEXICO
99-199
1122

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
35326	1/30/86	***51,397.07*

11838008?

PAY TO THE ORDER OF:

ESTATE OF MURRAY M CASH
3109 SOUTH ATLANTA
TULSA, OK 74105

ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

By _____

VOID AFTER 6 MOS.

⑈031844⑈ ⑆112201991⑆ 0103 809 5⑈01 ⑈0005139707⑈

Approved Only
Murray M. Cash, ESTATE
7000 SVIN

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FB 86 14
FIRST TENNESSEE BANK, N.A.
MEMPHIS, TENNESSEE
P.E.G. PAY ANY BANK

FB 86 14
PAY ANY BANK P.E.G.
FIRST CITY
NATIONAL BANK
OF EL PASO

BEST AVAILABLE COPY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:	)	
	)	
ALAN J. and MARY FRANCES ANTWEIL,	)	
Debtors,	)	No. 11-86-00254 MA
In re:	)	
	)	
HOBBS PIPE AND SUPPLY, a general partnership,	)	
	)	
Debtor,	)	No. 11-86-00255 MA
In re:	)	
	)	
MORRIS R. ANTWEIL,	)	
	)	
Debtor.	)	
	)	No. 11-86-00257 MA

ELLIOT JOHNSON, Trustee,	)	
	)	
Plaintiff,	)	
	)	Adversary Proceeding No. 88-0136 M
vs.	)	
	)	
WILLIAM BARNHILL, BRAVO ENERGY, INC., the Estate of MURRAY M. CASH, and the Estate of SOL LITT, IV,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

(Filed June 17, 1988)

COMES, NOW, Defendant William Barnhill (hereinafter referred to as "Defendant Barnhill"), by and through

his attorneys, Francis & Arland, P.A., by William J. Arland, III, and moves this Court to enter its order dismissing this action as against him, and as grounds therefore states:

1. The Complaint to Recover Preferential Transfers (hereinafter referred to as "Complaint") fails to state a claim upon which relief can be granted and Defendant Barnhill is entitled to dismissal of Plaintiff's Complaint, with prejudice, as a matter of law.

2. This Court lacks subject matter jurisdiction over the property in question to hear this case.

3. Counsel for Defendant Barnhill has made numerous attempts to contact counsel for Plaintiff telephonically to secure counsel's consent or objection to this Motion, but to date has been unable to do so. However, it is reasonably believed that counsel for Plaintiff will oppose this Motion to Dismiss.

WHEREFORE, Defendant William Barnhill requests this Court enter its order dismissing Plaintiff's Complaint to Recover Preferential Transfers, with prejudice, as against him, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

FRANCIS & ARLAND, P.A.

BY /s/ William J. Arland, III
WILLIAM J. ARLAND, III
Attorneys for Defendant
William Barnhill
Post Office Box 25267
Albuquerque, New Mexico
87125-5267
Telephone: (505) 247-3651

Certificate of Service

We hereby certify that true and correct copy of the foregoing pleading was mailed, by First Class, U.S. Mail, postage prepaid, this 17th day of June, 1988, to the following:

Nancy S. Cusack
Attorney for Trustee
Post Office Box 10
Roswell, New Mexico 88201

John M. Caraway, Esq.
Attorney at Law
Post Office Box 1718
Carlsbad, New Mexico 88220

P. Diane Webb, Esq.
Office of the United States Trustee
Post Office Box 608
Albuquerque, New Mexico 87103

FRANCIS & ARLAND, P.A.

By /s/ William J. Arland, III
WILLIAM J. ARLAND, III

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:	)	
ALAN J. and MARY FRANCES ANTWEIL, Debtors,	)	No. 11-86-00254 MA
In re:	)	
HOBBS PIPE AND SUPPLY, a general partnership, Debtor,	)	No. 11-86-00255 MA
In re:	)	
MORRIS R. ANTWEIL, Debtor.	)	No. 11-86-00257 MA

ELLIOT JOHNSON, Trustee, Plaintiff,	)	Adversary Proceeding
vs.	)	No. 88-0136 M
WILLIAM BARNHILL, BRAVO ENERGY, INC., and GOLDIE CASH, as PERSONAL REPRESENTATIVE for the ESTATE OF MURRAY M. CASH, Defendants.	)	

FIRST AMENDED COMPLAINT TO RECOVER PREFERENTIAL TRANSFERS

(Filed Oct. 6, 1988)

COMES NOW Elliott Johnson, the Court-appointed Chapter 11 Trustee (hereinafter "Trustee") and pursuant to this Court's oral ruling of September 27, 1988 authorizing the Trustee to file this Amended Complaint naming as a Defendant Goldie Cash, as Personal Representative of the Estate of Murray Cash, files this amended adversary proceeding pursuant to §547(b) of Title 11, United States Code, and Rule 7001, Rules of Bankruptcy Procedure, and states the following:

General Allegations

1. On February 18, 1986, the Debtors filed voluntary petitions for relief thereby commencing the Chapter 11 proceedings. On May 15, 1986, Elliott Johnson was appointed as the Chapter 11 Trustee.

2. Jurisdiction herein is based upon 28 USC §1334(b) in that this case arises under Title 11, United States Code. This proceeding is a "core" proceeding under 28 USC §157(b) (2) (F) and relates to the above-captioned bankruptcy cases.

COUNT I
Against William Barnhill

3. The Trustee realleges each and every allegation made or contained in the general allegations as set forth above.

4. Defendant William Barnhill is a resident of the State of New Mexico.

5. On November 19, 1985, which is within 90 days of the date of the Petitioners having filed their voluntary petitions in bankruptcy herein, the Debtors herein, a/k/a Antweil Oil Company, transferred certain of its property to and for the benefit of the Defendant William Barnhill to pay an antecedent debt.

6. Such transfer was made when the Defendant William Barnhill received payment from Antweil Oil Company for past due invoices. Antweil Oil Company made payment by check dated November 19, 1985, in the amount of $157,148.22. A copy of said check is attached here as Exhibit A. Said copy was made pursuant to a settlement agreement reached by Debtors and Mr. Barnhill.

7. Such transfer was made while the Debtor was insolvent.

8. By virtue of such transfer, Defendant William Barnhill has recovered more than he would receive otherwise as a Creditor of a bankruptcy case if:

a. The Bankruptcy Code was a Chapter 7 case under Title 11 United States Code,

b. The transfer had not been made, and

c. Defendant William Barnhill received payment of his debt to the extent provided for the under provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against the Defendant William Barnhill to:

a. Void the transfer to Defendant William Barnhill described herein; and

b. Against Defendant William Barnhill for $157,148.22, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

COUNT II

Against Bravo Energy Company

9. The Trustee realleges each and every allegation made and contained in Paragraphs 1 and 2 as so fully set forth herein.

10. Defendant Bravo Energy, Inc., is a corporation doing business in Hobbs, New Mexico.

11. On or about December 26 and 27, 1985, which is within 90 days of the date of the Debtors having filed their voluntary petitions for bankruptcy herein, certain property of the Debtors was transferred to and for the benefit of the Defendant Bravo Energy in order to pay an antecedent debt.

12. Such transfer was made when Defendant Bravo Energy received payments as follows:

a.	12/26/85	$80,341.76
b.	12/27/85	12,694.46
	Total	$93,036.22

Copies of said checks are attached hereto as Exhibits B and C, respectively.

13. Such transfer was made while the Debtors were insolvent.

14. By virtue of such transfer, Defendant Bravo Energy will recover more than it would otherwise receive as a Creditor of the bankruptcy estate if:

a. The Bankruptcy Codes were a Chapter 7 case under Title 11 of the United States Code,

b. The transfer had not been made, and

c. Defendant Bravo Energy received payment of his debt to the extent provided by the provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against Defendant Bravo Energy:

a. Voiding the transfer to Defendant described herein;

b. Against Defendant Bravo Energy for $93,036.22, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

COUNT III
Against Goldie Cash, as Personal Representative of the Estate of Murray M. Cash

15. Goldie Cash, Personal Representative of the Estate of Murray Cash, is a resident of Tulsa County, Oklahoma. The Trustee is informed and believes that the Estate of Murray M. Cash is being administered in the

State of Oklahoma and its legal counsel is Rosenstein, Fist & Ringold (John E. Howland) who are attorneys practicing in Tulsa, Oklahoma.

16. On or about January 30, 1986, the Debtors transferred certain of their property to and for the benefit of the Defendant Estate of Murray M. Cash on account of an antecedent debt.

17. Such transfer was made when the Estate of Murray M. Cash received payment by check dated January 1, 1986, in the amount of $51,397.07. Said check was issued by Antweil Oil Company. A copy of such check is attached hereto as Exhibit D.

18. Such transfer was made while the Debtors were insolvent.

19. Such transfer would enable the Estate of Murray M. Cash to recover more than it would otherwise receive as a Creditor of the bankruptcy estate if:

a. The bankruptcies were cases under Chapter 7 of Title 11, United State Code;

b. The transfers had not been made; and

c. The Estate of Murray M. Cash received payment of its debt to the extent provided for by the provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against Goldie Cash, as Personal Representative of the Estate of Murray M. Cash:

a. Voiding the transfer to the Estate of Murray M. Cash described herein;

b. Against the Estate of Murray M. Cash for $51,397.07, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

HINKLE, COX, EATON,
COFFIELD & HENSLEY

By /s/ Andrew J. Cloutier

Nancy S. Cusack
William P. Johnson
Andrew J. Cloutier
P. O. Box 10
Roswell, New Mexico
88201
(505) 622-6510

Attorneys for Elliott
Johnson, Trustee

EXHIBIT A

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
ALBUQUERQUE, NEW MEXICO
95-27
1070

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
	11-19-85	**$157,148.22

PAY TO THE ORDER OF:

William Barnhill

1001211107
ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

"013089" :107000275: 19151095 1" "00157148 22"

For Deposit Only
TEXAS OIL COMPANY

95-93 PAY ANY BK. BKR. OR TR. CO.
95-93 UNITED NM. ALBUQUERQUE
ENDORSEMENTS IN THIS BOX MUST NOT EXCEED 1½" IN HEIGHT

UNITED
NEW MEXICO
BANK AT
ROSWELL, N.A.

9 NOV 85

3331 2 5 2 9

20

$5.27

ALBUQUERQUE, NM

B326 0 8 7 2

BEST AVAILABLE COPY

EXHIBIT B

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
ALBUQUERQUE, NEW MEXICO
95-27
1070

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
	12-26-85	$80,341.76

PAY TO THE ORDER OF:

BRAVO ENERGY

ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

200213492

⑈013107⑈ ⑆107000275⑆ 19151095⑈ ⑈00080341 76⑈

95-93 UNITED NM ALBUQUERQUE

PAID
DEC 26 85
UNITED BANK OF LEA COUNTY
HOBBS, NEW MEXICO
95-199 95-199

DE 05 27

BEST AVAILABLE COPY

EXHIBIT C

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
ALBUQUERQUE, NEW MEXICO
95-27
1070

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
35251	12/27/85	***$12,694.46***

PAY TO THE ORDER OF:

Bravo Energy Inc.
A New Mexico Corp.
P. O. Box 758
Hobbs, NM 88241

ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

By

⑈013117⑈ ⑆107000275⑆ 19151095⑆ ⑈0001269446⑈

95-93 UNITED NM ALBUQUERQUE
0086 30000928 12-30-85 200866082

DE 85 31

PAY ANY BANK C.S.D.
FIRST NATIONAL BANK
ALBUQUERQUE, NM

95-27

FOR DEPOSIT ONLY
ANTWEIL OIL CO.
HOBBS, NEW MEXICO
BRAVO ENERGY, INC.

BEST AVAILABLE COPY

EXHIBIT D

ANTWEIL OIL COMPANY
P.O. BOX 2010
HOBBS, NEW MEXICO 88240

FIRST NATIONAL BANK
HOBBS, NEW MEXICO
99-199
1122

CHECK NO.	DATE OF CHECK	AMOUNT OF CHECK
35326	1/30/86	***51,397.07*

1122801991

PAY TO THE ORDER OF:

ESTATE OF MURRAY M CASH
3109 SOUTH ATLANTA
TULSA, OK 74105

ANTWEIL OIL COMPANY
OIL AND GAS ACCOUNT

By _____

VOID AFTER 6 MOS.

"031844" :1122019911: 0103 809 5"01 "0005139707"

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

IN RE:	)	
	)	
ALAN J. and MARY FRANCES ANTWEIL, husband and wife,	)	No. 11-86-00254 MA
	)	Chapter 11
	)	
Debtors.	)	JOINTLY
IN RE:	)	ADMINISTERED WITH
	)	
HOBBS PIPE AND SUPPLY, a general partnership,	)	No. 11-86-00255 MA
	)	Chapter 11
Debtor.	)	
	)	
IN RE:	)	
	)	
MORRIS R. ANTWEIL,	)	No. 11-86-00257 MA
	)	Chapter 11
Debtor.	)	
	)	
ELLIOTT JOHNSON, Trustee,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No.
	)	88-0136M
WILLIAM BARNHILL, BRAVO ENERGY, INC., and GOLDIE CASH, as Personal Representative of the ESTATE OF MURRAY M. CASH,	)	
	)	
	)	
	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT TO RECOVER PREFERENTIAL TRANSFERS

(Filed Oct. 11, 1988)

COMES NOW the Plaintiff, Elliott Johnson, Trustee ("Trustee"), by and through his attorneys of record, and hereby respectfully request that this Court grant him leave to amend his Complaint to recover Preferential Transfers and as grounds therefore will show this Court as follows:

1. In light of the recent controversy surrounding the date of the alleged preferential transfer to Defendant William Barnhill, the Trustee has recently re-examined evidence in his possession that he believes provides a basis to assert an alternative claim against the Defendant Barnhill that the transfer occurred on November 20, 1985. The Trustee was not aware of this claim when he filed the Complaint. The Trustee did not alter, in any way, his claims against the other two Defendants.

2. Bankruptcy Rule of Procedure 7015 states that Federal Rule of Civil Procedure 15 shall apply to adversary proceedings arising under the Bankruptcy Code.

3. Federal Rule of Civil Procedure 15(a) states that leave to amend "shall be freely given when justice so requires."

4. The Trustee should be allowed to amend its complaint to assert all claims that it has against the Defendant Barnhill in order to protect the Estate. The Estate will be unduly prejudiced if it is not allowed to amend its complaint.

5. A Memorandum in Support of this Motion is submitted concurrently herewith.

6. A copy of the proposed Second Amended Complaint to Recover Preferential Transfers is attached hereto as Exhibit "A".

7. No Defendant hereto will be unduly prejudiced by this Court granting the Trustee leave to amend his Complaint.

8. Pursuant to Local Rules, counsel for the Trustee attempted to obtain the consent of counsel for Defendant Barnhill and he was not available, counsel for the Trustee assumes that Defendant Barnhill will oppose this Motion. Counsel for other Defendants were not contacted since their clients are unaffected by this Motion.

WHEREFORE, Elliott Johnson, Trustee, respectfully requests that this Court grant him leave to file his Second Amended Complaint to Recover Preferential Transfers and for such other and further relief as the Court deems just and proper.

HINKLE, COX, EATON, COFFIELD & HENSLEY

By /s/ Andrew J. Cloutier
Nancy S. Cusack
William P. Johnson
Andrew J. Cloutier
P.O. Box 10
Roswell, New Mexico 88202
(505) 622-6510

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing Motion for Leave to File First Amended Complaint was mailed, via first class mail, postage prepaid, to all counsel for Defendants this 7th day of October, 1988.

/s/ Andrew J. Cloutier
Nancy S. Cusack
William P. Johnson
Andrew J. Cloutier

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:	)	
ALAN J. and MARY FRANCES ANTWEIL,	)	
Debtors.	)	No. 11-86-00254 MA
IN RE:	)	
HOBBS PIPE AND SUPPLY, a general partnership,	)	
Debtor.	)	No. 11-86-00255 MA
IN RE:	)	
MORRIS R. ANTWEIL,	)	
Debtor.	)	No. 11-86-00257 MA

ELLIOTT JOHNSON, Trustee,	)	
Plaintiff,	)	
vs.	)	
WILLIAM BARNHILL, BRAVO ENERGY, INC., and GOLDIE CASH, as Personal Representative of the Estate of Murray Cash,	)	
Defendants.	)	Adversary Proceeding No. 88-0136M

SECOND AMENDED COMPLAINT TO RECOVER PREFERENTIAL TRANSFERS

(Filed Oct. 11, 1988)

COMES NOW Elliott Johnson, the Court-appointed Chapter 11 Trustee (hereinafter "Trustee") for the above-captioned bankruptcy estates and files this amended adversary proceeding pursuant to §547(b) of Title 11, United States Code, and Rule 7001, Rules of Bankruptcy Procedure, and states the following:

General Allegations

1. On February 18, 1986, the Debtors filed voluntary petitions for relief thereby commencing the Chapter 11 proceedings. On May 15, 1986, Elliott Johnson was appointed as the Chapter 11 Trustee.

2. Jurisdiction herein is based upon 28 USC §1334(b) in that this case arises under Title 11, United States Code. This proceeding is a "core" proceeding under 28 USC §157(b)(2)(F) and relates to the above-captioned bankruptcy cases.

COUNT I
Against William Barnhill

3. The Trustee realleges each and every allegation made or contained in the general allegations as set forth above.

4. Defendant William Barnhill is a resident of the State of New Mexico.

5. On November 19, 1985, which is within 90 days of the date of the Petitioners having filed their voluntary petitions in bankruptcy herein, the Debtors herein, a/k/a Antweil Oil Company, transferred certain of its property to and for the benefit of the Defendant William Barnhill to pay an antecedent debt.

6. Such transfer was made when the Defendant William Barnhill received payment from Antweil Oil Company for past due invoices. Antweil Oil Company made payment by check dated November 19, 1985, in the amount of $157,148.22. A copy of said check is attached here as Exhibit A. Said transfer was made pursuant to a settlement agreement reached by Debtors and Mr. Barnhill.

7. Alternatively, the transfer from Debtors to William Barnhill was made on November 20, 1985. On information and belief, the Trustee states that the check attached hereto as Exhibit A was delivered to William Barnhill and/or his agents on November 18, 1985, said check was postdated to November 19, 1985, and said check was honored by the drawee on November 20, 1985.

8. Such transfer was made while the Debtor was insolvent.

9. By virtue of such transfer, Defendant William Barnhill has recovered more than he would receive otherwise as a Creditor of a bankruptcy case if:

a. The Bankruptcy Code was a Chapter 7 case under Title 11 United States Code,

b. The transfer had not been made, and

c. Defendant William Barnhill received payment of his debt to the extent provided for the under provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against the Defendant William Barnhill to:

a. Void the transfer to Defendant William Barnhill described herein; and

b. Against Defendant William Barnhill for $157,148.22, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

COUNT II
Against Bravo Energy Company

10. The Trustee realleges each and every allegation made and contained in Paragraphs 1 and 2 as so fully set forth herein.

11. Defendant Bravo Energy, Inc., is a corporation doing business in Hobbs, New Mexico.

12. On or about December 26 and 27, 1985, which is within 90 days of the date of the Debtors having filed their voluntary petitions for bankruptcy herein, certain property of the Debtors was transferred to and for the benefit of the Defendant Bravo Energy in order to pay an antecedent debt.

13. Such transfer was made when Defendant Bravo Energy received payments as follows:

a.	12/26/85	$80,341.76
b.	12/27/85	12,694.46
	Total	$93,036.22

Copies of said checks are attached hereto as Exhibits B and C, respectively.

14. Such transfer was made while the Debtors were insolvent.

15. By virtue of such transfer, Defendant Bravo Energy will recover more than it would otherwise receive as a Creditor of the bankruptcy estate if:

a. The Bankruptcy Codes were a Chapter 7 case under Title 11 of the United States Code,

b. The transfer had not been made, and

c. Defendant Bravo Energy received payment of his debt to the

extent provided by the provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against Defendant Bravo Energy:

a. Voiding the transfer to Defendant described herein;

b. Against Defendant Bravo Energy for $93,036.22, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

COUNT III

Against Goldie Cash, as Personal Representative of the Estate of Murray M. Cash

16. Goldie Cash, Personal Representative of the Estate of Murray Cash, is a resident of Tulsa County, Oklahoma. The Trustee is informed and believes that the Estate of Murray M. Cash is now pending in the State of Oklahoma and its legal counsel is Rosenstein, Fist & Ringold (John E. Howland) who are attorneys practicing in Tulsa, Oklahoma.

17. On or about January 30, 1986, the Debtors transferred certain of their property to and for the benefit of the Defendant Estate of Murray M. Cash on account of an antecedent debt.

18. Such transfer was made when the Estate of Murray M. Cash received payment by check dated January 1, 1986, in the amount of $51,397.07. Said check was issued by Antweil Oil Company. A copy of such check is attached hereto as Exhibit D.

19. Such transfer was made while the Debtors were insolvent.

20. Such transfer would enable the Defendant Estate of Murray M. Cash to recover more than it would otherwise receive as a Creditor of the bankruptcy estate if:

a. The bankruptcies were cases under Chapter 7 of Title 11, United State Code;

b. The transfers had not been made; and

c. The Estate of Murray M. Cash received payment of its debt to the extent provided for by the provisions of Title 11.

WHEREFORE, Plaintiff prays for judgment against the Defendant Goldie Cash, as Personal Representative of the Estate of Murray M. Cash:

a. Voiding the transfer to the Estate of Murray M. Cash described herein;

b. Against the Estate of Murray M. Cash for $51,397.07, the amount of the preferential transfer; and

c. For Plaintiff's costs in this action and for such other and further relief as the Court deems just and proper.

HINKLE, COX, EATON, COFFIELD
& HENSLEY

By /s/ Andrew J. Cloutier
Nancy S. Cusack
William P. Johnson
Andrew J. Cloutier
P.O. Box 10
Roswell, New Mexico 88201
(505) 622-6510

Attorneys for Elliott Johnson, Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In Re:	)	
ALAN J. and MARY FRANCES ANTWEIL, husband and wife,	)	
Debtors.	)	No. 11-86-00254 MA
In Re:	)	
HOBBS PIPE AND SUPPLY, a general partnership,	)	
Debtor.	)	No. 11-86-00255 MA
In Re:	)	
MORRIS R. ANTWEIL,	)	
Debtor.	)	No. 11-86-00257 MA

ELLIOTT JOHNSON, Trustee,	)	
Plaintiff,	)	
vs.	)	
WILLIAM BARNHILL, BRAVO ENERGY, INC., and GOLDIE CASH, as PERSONAL ESTATE OF MURRAY M. CASH,	)	
Defendants.	)	Adversary Proceeding No. 88-0136M

OBJECTION TO MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT TO RECOVER PREFERENTIAL TRANSFERS

(Filed Oct. 13, 1988)

COMES NOW Defendant William Barnhill, by and through his attorneys, Butt, Thornton & Baehr, P.C., by William J. Arland, III, and hereby objects to Plaintiff's Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers, and as grounds therefore states as follows:

1. It is clear from the Complaint, First Amended Complaint and proposed Second Amended Complaint, that the alleged transfer of funds to Defendant Barnhill occurred on November 18, 1985 or November 19, 1985.

2. Whether or not the funds were transferred on November 18, 1985 or November 19, 1985, such transfer cannot be avoided by the Plaintiff.

3. Defendant Barnhill will be unduly prejudiced by this Court granting the Plaintiff leave to file this Second Amended Complaint in that a Motion to Dismiss the Complaint was filed on June 17, 1988, and a hearing on that portion occurred in September, 1988. Briefs have been filed in this matter and it is presently pending before this Court. The Motion is premature and will remain so until the Court decides Defendant's Motion to Dismiss.

4. A Memorandum in Support of this Objection is submitted concurrently herewith.

WHEREFORE, Defendant William Barnhill respectfully requests that this Court deny Plaintiff Elliott Johnson leave to file his Second Amended Complaint, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

BUTT, THORNTON & BAEHR, P.C.

By /s/ William J. Arland, III
WILLIAM J. ARLAND, III
Attorneys for Defendant Barnhill
Post Office Box 25267
Albuquerque, New Mexico 87125-5267
Telephone: (505) 247-3651

Certificate of Service

We hereby certify that a true and correct copy of the foregoing pleading was mailed, by First Class, U.S. Mail, postage prepaid, this 13th day of October, 1988, to the following:

Nancy S. Cusack, Esq.
Attorney for Trustee/Plaintiff
Post Office Box 10
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John M. Caraway, Esq.
Attorney at Law
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Gail Gottlieb, Esq.
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Albuquerque, New Mexico 87103-1945

John E. Howland, Esq.
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Tulsa, Oklahoma 74103

Edward D. Myers, Esq.
Jennie Deden Behles, J.D., P.A.
Attorneys for Litt Estate
Post Office Box 849
Albuquerque, New Mexico 87103-0849

P. Diane Webb, Esq.
Office of the United States Trustee
Post Office Box 608
Albuquerque, New Mexico 87103

BUTT, THORNTON & BAEHR, P.C.

By /s/ William J. Arland
WILLIAM J. ARLAND, III

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In Re:	)	
ALAN J. and MARY FRANCES ANTWEIL, husband and wife,	)	No. 11-86-00254 MA
Debtors.	)	
In Re:	)	
HOBBS PIPE AND SUPPLY, a general partnership,	)	
Debtor.	)	No. 11-86-00255 MA
In Re:	)	
MORRIS R. ANTWEIL,	)	
Debtor.	)	No. 11-86-00257 MA

ELLIOTT JOHNSON, Trustee,	)	
Plaintiff,	)	
vs.	)	
WILLIAM BARNHILL, BRAVO ENERGY, INC., and GOLDIE CASH, as PERSONAL ESTATE OF MURRAY M. CASH,	)	
Defendants.	)	Adversary Proceeding No. 88-0136M

MOTION TO DISMISS
(Filed Oct. 13, 1988)

COMES NOW Defendant William Barnhill, (hereinafter referred to as "Defendant Barnhill") by and through his attorneys of record, Butt, Thornton & Baehr, P.C., by William J. Arland, III, and moves this Court to dismiss this action as against him, and as grounds therefore states:

1. The First Amended Complaint to Recover Preferential Transfers (hereinafter referred to as "First Amended Complaint") fails to state a claim upon which relief can be granted, and Defendant Barnhill is entitled to dismissal of Plaintiff's First Amended Complaint with prejudice, as a matter of law.

2. This Court lacks subject matter jurisdiction over the property in question to hear the case.

3. A Motion to Dismiss was filed by Defendant Barnhill in response to the original Complaint filed herein, and a Memorandum of Law in Support of the Motion to Dismiss the original Complaint was filed by Defendant Barnhill on October 11, 1988, pursuant to the Court's instructions. All arguments contained therein are incorporated in this Motion.

4. Counsel for Defendant Barnhill assumes that counsel for plaintiff will object to this Motion, since counsel for plaintiff objected to the very same motion to the original Complaint.

WHEREFORE, Defendant William Barnhill requests that this Court enter its order dismissing Plaintiff's First Amended Complaint to Recover Preferential Transfers

with prejudice against him, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

BUTT, THORNTON & BAEHR, P.C.

By /s/ Louise Gibson
WILLIAM J. ARLAND, III
Attorneys for Defendant William Barnhill
Post Office Box 25627
Albuquerque, New Mexico 87125-5627
(505) 247-3651

Certificate of Service

We hereby certify that a true and correct copy of the foregoing pleading was mailed, by First Class, U.S. Mail, postage prepaid, this 13th day of October, 1988, to the following:

Nancy S. Cusack, Esq.
Attorney for Trustee/Plaintiff
Post Office Box 10
Roswell, New Mexico 88201

John M. Caraway, Esq.
Attorney at Law
Post Office Box 1718
Carlsbad, New Mexico 88220

Gail Gottlieb,
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John E. Howland,
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Tulsa, Oklahoma 74103

P. Diane Webb, Esq.
Office of the United States Trustee
Post Office Box 608
Albuquerque, New Mexico 87103

BUTT, THORNTON & BAEHR, P.C.

By /s/ Louise Gibson
WILLIAM J. ARLAND, III

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re

ALAN J. ANTWEIL and MARY FRANCES ANTWEIL,
HOBBS PIPE AND SUPPLY, a general partnership,
MORRIS R. ANTWEIL,

Jointly administered under
No. 11-86-00254 M A

Debtors.

ELLIOTT JOHNSON, trustee,

Plaintiff,

v. Adversary 88-0136 M

WILLIAM BARNHILL, BRAVO ENERGY, INC., and
GOLDIE CASH as personal representative of
the Estate of Murray M. Cash,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION
TO FILE A SECOND AMENDED COMPLAINT

(Filed March 1, 1989)

This matter came before the Court for hearing on plaintiff's motion to file a second amended complaint and the objection thereto filed by defendant Barnhill. For the reasons set forth in the memorandum opinion entered herewith,

IT IS ORDERED that plaintiff's motion to file a second amended complaint is hereby denied.

/s/ Mark B. McFeeley
MARK B. McFEELEY
United States
Bankruptcy Judge

I certify that on the above stamped date I mailed a copy of the above to:

Ms. Nancy S. Cusack
Mr. William P. Johnson
Attorneys at Law (plaintiff)
PO Box 10
Roswell, NM 88201

Mr. William J. Arland III
Attorney at Law (defendants Barnhill and Bravo)
PO Box 3170
Albuquerque, NM 87190

Ms. Gail Gottlieb
Attorney at Law (defendant Cash Estate, local)
PO Box 1945
Albuquerque, NM 87103-1945

Mr. John E. Howland
Attorney at Law (defendant Cash Estate)
525 South Main, Suite 300
Tulsa, OK 74103

/s/ Di N. Martinez
Dinah N. Martinez,
Deputy Clerk
(505) 766-1873

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re

ALAN J. ANTWEIL and MARY FRANCES ANTWEIL,
HOBBS PIPE AND SUPPLY, a general partnership,
MORRIS R. ANTWEIL,

Jointly administered under
No. 11-86-00254 M A

Debtors.

ELLIOTT JOHNSON, trustee,

Plaintiff,

v. Adversary 88-0136 M

WILLIAM BARNHILL, BRAVO ENERGY, INC., and
GOLDIE CASH as personal representative of
the Estate of Murray M. Cash,

Defendants.

ORDER DISMISSING DEFENDANT BARNHILL

(Filed Mar. 1, 1989)

This matter came before the Court on defendant Barnhill's motion to dismiss plaintiff's first amended complaint, filed October 13, 1988. On October 11, 1988 the plaintiff had filed a motion for leave to file a second amended complaint. The Court reserved ruling on Barnhill's motion pending resolution of plaintiff's motion to amend. By separate order entered herewith plaintiff's motion to amend has been denied. For the reasons set forth in the October 24, 1988 order in this case the Court now finds Barnhill's motion well taken.

IT IS ORDERED that defendant Barnhill's motion to dismiss is hereby granted.

/s/ Mark B. McFeeley
MARK B. McFEELEY
United States
Bankruptcy Judge

I certify that on the above stamped date I mailed a copy of the above to:

Ms. Nancy S. Cusack
Mr. William P. Johnson
Attorneys at Law (plaintiff)
PO Box 10
Roswell, NM 88201

Mr. William J. Arland III
Attorney at Law (defendants Barnhill and Bravo)
PO Box 3170
Albuquerque, NM 87190

Ms. Gail Gottlieb
Attorney at Law (defendant Cash Estate, local)
PO Box 1945
Albuquerque, NM 87103-1945

Mr. John E. Howland
Attorney at Law (defendant Cash Estate)
525 South Main, Suite 300
Tulsa, OK 74103

/s/ Di N. Martinez
Dinah N. Martinez,
Deputy Clerk
(505) 766-1873

DECISIONS SOUGHT TO BE REVIEWED

Elliott Johnson, Trustee vs. William Barnhill, et al. (In re Antweil), United States Court of Appeals for the Tenth Circuit, No. 90-2065 (April 30, 1991) ..... Reprinted in Appendix A to Petition for Writ of Certiorari, page 1a

Elliott Johnson vs. William Barnhill (In re Antweil), United States District Court for the District of New Mexico CIV No. 89-0316-JP (February 27, 1990) ..... Reprinted in Appendix B to Petition for Writ of Certiorari page 13a

Elliott Johnson, Trustee vs. William Barnhill, et al. (In re Antweil), United States Bankruptcy Court for the District of New Mexico No. 11-86-00254 MA, Adversary No. 88-0136 M (March 1, 1989) ..... Reprinted in Appendix C to Petition for Writ of Certiorari page 24a

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STATUTES INVOLVED

11 U.S.C. § 547 ..... Reprinted in Appendix D to Petition for Writ of Certiorari, page 29a

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Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

No. 91-159

In The

Supreme Court of the United States

October Term, 1991

IN RE ALAN J. and MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE & SUPPLY, a general partnership, and MORRIS R. ANTWEIL,

Debtors.

WILLIAM BARNHILL,

Petitioner,

v.

ELLIOT JOHNSON, Trustee,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONER

WILLIAM J. ARLAND, III
EMILY A. FRANKE*
BUTT, THORNTON & BAEHR, P.C.
Post Office Box 3170
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Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

For purposes of establishing a voidable preference under Section 547(b) of the Bankruptcy Code, when payment is made by check, is the effective date of the transfer the date the check is delivered to the payee or the date the check is honored by the drawee bank?

LIST OF PARTIES

The petitioner, William Barnhill, is an individual and a resident of the State of New Mexico. The respondent, Elliott Johnson, is the Trustee, under Chapter 11 of the Bankruptcy Code, of the bankruptcy estates of Alan J. and Mary Frances Antweil, husband and wife, Hobbs Pipe & Supply, a New Mexico general partnership, and Morris R. Antweil, an individual.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS IN THE COURTS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	8
ARGUMENT	9
I. PREFERENTIAL TRANSFERS UNDER SECTION 547 OF THE BANKRUPTCY CODE	10
II. A DATE OF DELIVERY RULE SHOULD APPLY TO TRANSFERS UNDER 11 U.S.C. § 547(b)	13
A. LEGISLATIVE HISTORY SUPPORTS A DATE OF DELIVERY RULE	14
B. COMMERCIAL PRACTICE AND THE UNIFORM COMMERCIAL CODE SUPPORT A DATE OF DELIVERY RULE	16
III. ADOPTION OF A UNIFORM RULE FOR SECTION 547 FURTHERS BANKRUPTCY POLICIES	18

TABLE OF CONTENTS – Continued

Page

IV. THE UNIFORM COMMERCIAL CODE SHOULD NOT LIMIT THE DEFINITION OF TRANSFER..... 20

V. EASE OF PROOF AND MANIPULATION ARE NOT GROUNDS FOR A DATE OF HONOR RULE..... 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Begier v. Internal Revenue Service, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990).....11, 19

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Page

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UNITED STATES STATUTES

11 U.S.C. § 101(54) ..... *passim*

11 U.S.C. § 547..... *passim*

11 U.S.C. § 547(b) ..... *passim*

11 U.S.C. § 547(b)(1)-(4) 11, 13

11 U.S.C. § 547(c) ..... *passim*

11 U.S.C. § 547(c)(1) and (2).....12, 15

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 547(e) ..... *passim*

28 U.S.C. § 1334(b) 1

28 U.S.C. § 157(b)(2)(F) 1

28 U.S.C. § 158(a) 1, 6

LEGISLATIVE HISTORY

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UNIFORM COMMERCIAL CODE

U.C.C. § 3-122.....17, 18

U.C.C. § 3-202..... 18

TABLE OF AUTHORITIES – Continued

Page

U.C.C. § 3-409(1) 20, 21

U.C.C. § 3-503 ..... 16, 22

U.C.C. § 3-503(2)(a) 14

LAW REVIEW

Countryman, The Concept of A Voidable Preference in Bankruptcy, 38 Vand. L. Rev. 713, 761 (1985) 15

RULES

FED.R.EVID. 101 23

NEW MEXICO STATUTES

N.M. Stat. Ann. § 55-1-101 through § 55-12-108 (1978) 17

OPINIONS IN THE COURTS BELOW

The April 30, 1991 opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir. 1991), and is reprinted in Appendix A to the Petition for Writ of Certiorari. The prior opinion of the United States District Court for the District of New Mexico is reported at *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337 (D.N.M. 1990), and is also reprinted in Appendix B to the Petition for Writ of Certiorari. The prior opinion of the United States Bankruptcy Court for the District of New Mexico is reported at *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69 (Bankr. D.N.M. 1989), and is reprinted in Appendix C to the Petition for Writ of Certiorari. (*See* Joint Appendix ["J.A."] 53 for citations to the specific pages in the Appendices to the Petition for Writ of Certiorari.)

JURISDICTIONAL STATEMENT

The respondent, Elliott Johnson, Trustee, filed the Adversary Proceeding which commenced this action on May 12, 1988. The United States Bankruptcy Court for the District of New Mexico had jurisdiction based on 28 U.S.C. § 1334(b) in that the action arises in a case under Title 11 of the Bankruptcy Code and is a core proceeding under 28 U.S.C. § 157(b)(2)(F). (J.A. 5). The Bankruptcy Court issued its Opinion and Orders on March 1, 1989. (J.A. 49, 51). The Trustee timely filed his Notice of Appeal to the United States District Court for the District of New Mexico on March 10, 1989 pursuant to 28 U.S.C. § 158(a). (J.A. 2). The District Court entered its Memorandum

Opinion and Order affirming the Bankruptcy Court on February 27, 1990. (J.A. 2). The Trustee timely filed his Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on March 29, 1990. (J.A. 3). The Tenth Circuit Court of Appeals entered its Opinion and Order reversing the District Court on April 30, 1991. (J.A. 3). The Petition for Writ of Certiorari by William Barnhill was filed July 26, 1991. This Court granted the Petition for Writ of Certiorari on October 7, 1991.

STATUTES INVOLVED

This case involves the Bankruptcy Code, 11 U.S.C. § 547(b) and 11 U.S.C. § 101(54), which provides as follows:

11 U.S.C. § 547

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The full text of 11 U.S.C. § 547 is set out in Appendix D to the Petition for Writ of Certiorari. (*See* J.A. 54 for citation to the specific pages of the Appendices to the Petition).

11 U.S.C. § 101

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

STATEMENT OF THE CASE

Alan J. and Mary Frances Antweil, Hobbs Pipe and Supply, and Morris Antweil (the "Debtors"), filed Voluntary Petitions for Relief under Chapter 11 of the Bankruptcy Code on February 18, 1986. (J.A. 1). The cases were

jointly administered under United States Bankruptcy Court for the District of New Mexico Case No. 11-86-00254 MA. The respondent, Elliott Johnson (the "Trustee"), was appointed Trustee under Chapter 11 of the Bankruptcy Code on May 15, 1986, and accepted the appointment as Trustee on June 3, 1986. (J.A. 1). The Chapter 11 Plan of Reorganization for the Debtors was confirmed by the May 6, 1988 Order of the Bankruptcy Court. (J.A. 1).

The Trustee commenced Adversary Proceeding No. 88-0136M on May 12, 1988 by filing his Complaint to Recover Preferential Transfers. (J.A. 1). In his Complaint, the Trustee sought to avoid alleged preferential transfers to four creditors, including petitioner, William Barnhill. (J.A. 4-15). The three creditors other than William Barnhill were not parties to the proceedings on appeal in the Courts below, and the claims against them are not at issue in this case.

With respect to petitioner, William Barnhill, the Trustee alleged that the Debtors, by check dated November 19, 1985, transferred $157,148.22 to William Barnhill as payment for past due invoices. (J.A. 6, Paras. 5 and 6). The Trustee also alleged that the November 19, 1985 transfer occurred within 90 days of filing of the Bankruptcy Petitions by the Debtors. (J.A. 6, Para. 5). The Trustee requested that the transfer be voided as a preferential transfer and that judgment be awarded against William Barnhill in the amount of $157,148.22. (J.A. 6-7).

On June 17, 1988, William Barnhill filed a Motion to dismiss the Complaint on the grounds that the Complaint failed to state a claim upon which relief could be granted

and that the Bankruptcy Court lacked subject matter jurisdiction over the property. (J.A. 16-17).

The Trustee filed a First Amended Complaint to Recover Preferential Transfers on October 6, 1988. (J.A. 1). The amendments in the First Amended Complaint affected the claims against other defendant creditors, but did not materially alter the allegations against William Barnhill. (J.A. 19-29).

On October 11, 1988, the Trustee filed a Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers, with a proposed Second Amended Complaint attached as an Exhibit to the Motion. (J.A. 2, 30-40). The Trustee's Motion sought to amend the Complaint on the grounds that the Trustee had re-examined evidence and believed it provided a basis for asserting an alternative claim against William Barnhill that the transfer occurred on November 20, 1985. (J.A. 31, Para. 1). The proposed amendment in the Second Amended Complaint alleged that the check was delivered to William Barnhill by Debtors on November 18, 1985, the check was dated November 19, 1985 and the check was honored by the drawee bank on November 20, 1985. (J.A. 36, Para. 7).

William Barnhill filed an Objection to the Trustee's Motion for leave to file a Second Amended Complaint on October 13, 1988. (J.A. 2). Barnhill objected to the Motion on the grounds that the transfer had occurred either November 18 or 19, 1985, that regardless of whether the effective date was the 18th or the 19th of November, the Trustee could not avoid the transfer, and that the Motion was premature until the Bankruptcy Court decided the pending Motion to Dismiss. (J.A. 42).

On October 13, 1988, William Barnhill also filed a second Motion to Dismiss the First Amended Complaint. (J.A. 2). The second Motion sought dismissal of the First Amended Complaint on the same grounds as the Motion to Dismiss the original Complaint. (J.A. 46).

The Bankruptcy Court issued its Memorandum Opinion on March 1, 1989. (App. C to Petition, 24a.) In the Memorandum Opinion, the Bankruptcy Court took judicial notice of its file and found that the 90th day before filing of the Bankruptcy Petitions was November 20, 1985.[1] (App. C to Petition, 25a.) Further, relying in part on the case of *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986), the Bankruptcy Court found that a date of delivery rule should apply to Section 547(b) preference actions and that both the date of the check and the date of delivery of the check were outside the 90 day preference period. (App. C to Petition, 26a-27a.)

Based on its decision that a date of delivery rule should apply, on March 1, 1989, the Bankruptcy Court denied the Trustee's Motion to file a Second Amended Complaint and granted the Motions to Dismiss the claims against William Barnhill. (J.A. 49, 51).

Pursuant to 28 U.S.C. § 158(a), the Trustee appealed the Bankruptcy Court's Orders to the United States District Court for the District of New Mexico on March 10,

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[1] This finding is not at issue in this case. Based on Court rulings in a prior appeal, the parties agree that November 20, 1985 is on or within 90 days before the date of the filing of the Petition, but that November 19, 1985 is outside the 90 day period.

1989. (J.A. 2). The parties submitted briefs and, on February 27, 1990, the District Court entered its Memorandum Opinion and Order affirming the rulings of the Bankruptcy Court. (J.A. 2). The District Court held that the Bankruptcy Court properly relied on the case of *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986) and properly found that a date of delivery rule should apply to Section 547(b) preference actions. (App. B to Petition, 16a-17a.)

The Trustee appealed the decision of the District Court to the United States Court of Appeals for the Tenth Circuit on March 29, 1990. (J.A. 3). The parties' briefs were filed between May 8, 1990 and June 25, 1990. (J.A. 3).

The Tenth Circuit Court of Appeals filed its Opinion on April 30, 1991. (J.A. 3). The Tenth Circuit concluded that a date of honor rule, rather than a date of delivery rule, should apply to actions under Section 547(b), and reversed the District Court's decision. (App. A to Petition, 11a.) The Tenth Circuit rejected the lower Court's reliance on the *White River* case. Acknowledging a split in the decisions of the Circuit Courts of Appeal, the Tenth Circuit cited three bases for its decision: (1) that the purposes and functions of Sections 547(b) and 547(c) differ, supporting different rules for when a transfer occurs under the Sections; (2) that a date of honor rule is consistent with the provisions of the Uniform Commercial Code; and (3) that a date of honor rule is capable of easier proof than a date of delivery rule and less subject to manipulation. (App. A to Petition, 4a-11a.)

For purposes of proceedings on appeal, the parties have stipulated to the following material facts:

1. Debtors or their agents delivered a check in the amount of $157,148.22 to petitioner William Barnhill, or his agents, on November 18, 1985;

2. The check was dated November 19, 1985;

3. The drawee bank honored the check on November 20, 1985;

4. The 90th day before the bankruptcy petition was filed was November 20, 1985.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Tenth Circuit held that, for purposes of establishing a voidable preference under 11 U.S.C. § 547(b), when payment to a creditor is by check, the effective date of transfer is the date the check is honored by the drawee bank, rather than the date the check is delivered to the creditor. (App. to Petition, 11a.) Petitioner, William Barnhill, submits that the Tenth Circuit's decision was incorrect as a matter of law. Statutory construction of the provisions of 11 U.S.C. § 547(b), (c) and (e), and of 11 U.S.C. § 101(54), which defines the term transfer, establish that the effective date of transfer is the date of the transaction between the debtor and the creditor. Further, the legislative history of enactment of the Bankruptcy Code demonstrates Congress' intent that the date of delivery of a check should be the transfer date. A date of delivery rule is consistent with modern commercial practice and the provisions of

the Uniform Commercial Code that payment by check is the equivalent of a cash transaction. A rule under Section 547(b) that the date of delivery of a check is the date of transfer is also consistent with rules governing the provisions of Section 547(c) and (e) and furthers the congressional purpose of establishing a bankruptcy law that is uniform in its operation and its application. The date of delivery of a check should be the effective date of transfer for purposes of establishing a voidable preference under 11 U.S.C. § 547(b).

ARGUMENT

The sole issue presented by this case is whether, when payment is made by check, a date of delivery rule or a date of honor rule should apply to establish the date of transfer under the preference section of the Bankruptcy Code, 11 U.S.C. § 547(b).

In its decision in this case, the United States Court of Appeals for the Tenth Circuit adopted a date of honor rule, based on three grounds: (1) that the adoption of a date of delivery rule for purposes of the exceptions to the avoidance power set out in 11 U.S.C. § 547(c) does not require adoption of the same rule for Section 547(b), (App. to Petition, 4a); (2) that a date of honor rule is more in conformity with the provisions of the Uniform Commercial Code (App. to Petition, 8a); and (3) that a date of honor rule is easier to prove and less subject to manipulation than a date of delivery rule. (App. to Petition, 10a.)

In deciding the same issue, other Circuit Courts of Appeals have divided over whether a date of delivery

rule or a date of honor rule should apply. Courts which have adopted a date of delivery rule have done so based on conclusions that the same rule should apply to the avoidance powers under 11 U.S.C. § 547(b) as applies for the defenses to the avoidance powers in 11 U.S.C. § 547(c), and that a date of delivery rule is more in conformity with commercial reality that check transactions are intended to be the equivalent of payment in cash. *See, Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems)*, 932 F.2d 338 (4th Cir. 1991); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879 (6th Cir. 1990); *Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

In addition to the United States Court of Appeals for the Tenth Circuit, the Courts of Appeals for the Eleventh and Seventh Circuits have also adopted a date of honor rule in cases decided under the former Bankruptcy Act. *Nicholson v. First Investment Co.*, 705 F.2d 410 (11th Cir. 1983); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288 (7th Cir. 1974). The Eighth and Third Circuits have additionally indicated, *in dicta*, that they would apply a date of honor rule. *Kroh Brothers Development Co. v. Continental Construction Engineers, Inc. (In re Kroh Brothers Development)*, 930 F.2d 648, 650-51 (8th Cir. 1991); *In re New York City Shoes, Inc.*, 880 F.2d 679, 681 n.2 (3rd Cir. 1989).

I. PREFERENTIAL TRANSFERS UNDER SECTION 547 OF THE BANKRUPTCY CODE

Congress enacted the Bankruptcy Code in 1978. In enacting the Code, Congress included a provision making

certain preferential payments by debtors voidable by a trustee in bankruptcy. The provision relating to preferences was codified as 11 U.S.C. § 547. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990).

The trustee's powers to avoid certain preferential transfers of an interest in property of the debtor made within 90 days of filing of the petition for bankruptcy are set out in 11 U.S.C. § 547(b). In order to establish a preferential transfer, the trustee has the burden of proving (1) that a transfer was made to or for the benefit of the creditor, (2) for or on account of an antecedent debt, (3) made while the debtor was insolvent, (4) made on or within 90 days of filing of the petition, and (5) that the transfer enabled the creditor to receive more than the creditor would have if the case were a case under Chapter 7 of the Bankruptcy Code, and the transfer had not been made to the creditor. 11 U.S.C. § 547(b)(1)-(4).

Section 547(b) was enacted in furtherance of the policy of equality of distribution among creditors of equal priority. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990). The purpose of the section is to facilitate distribution of the debtor's assets among creditors. H.R. Rep. No. 595, 95th Cong. 1st Sess. 177-78, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 5963, 6138.[2] To accomplish this purpose, Congress created an

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[2] The House Report states as follows:

> The purpose of the preference section is two-fold. First, by permitting the trustee to avoid pre-bankruptcy transfers that occur within a short period

(Continued on following page)

arbitrary time period of 90 days prior to filing of the bankruptcy petition. Creditors paid before this period may keep the payment, while creditors paid on or within the 90 day period must disgorge the payment to be shared with other creditors. *See, e.g., Yellowhouse Machinery Co. v. Mack (In re Hughes)*, 704 F.2d 820, 822 (5th Cir. 1983).

The companion provision to Section 547(b) is 11 U.S.C. § 547(c), which sets out exceptions to the trustee's avoidance powers. The Bankruptcy Code, in Section 547(c), contains seven specific statutory exceptions to the trustee's avoidance power under Section 547(b). Transfers made in the ordinary course of business and contemporaneous exchanges for new value are excluded from the reach of the voidability provisions. 11 U.S.C. § 547(c)(1)

(Continued from previous page)

> before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section – that of equality of distribution.

H.R. Rep. No. 595, 95th Cong. 1st Sess. 177-78 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6138.

and (2). The exceptions to the avoidance power in Section 547(c) are raised as defenses to the trustee's action, and the burden of proving the exceptions is on the creditor.

The exceptions to the trustee's avoidance power were intended to encourage creditors to come to the aid of financially troubled businesses and to protect ordinary business transactions. The Section 547(c) exceptions were intended to encourage trade creditors and other suppliers of goods and services to continue dealing with troubled businesses without fear of the trustee's avoidance powers. *See Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 634 (10th Cir. 1986).

In an action for avoidance of a preferential transfer, a primary issue generally is whether the debtor transferred an interest in property within the 90 day period prior to filing of the bankruptcy petition. 11 U.S.C. § 547(b)(4). The term "transfer" is defined in 11 U.S.C. § 101(54), rather than in Section 547. Section 101(54) defines "transfer" to mean every mode of disposing of or parting with property or with an interest in property, whether direct or indirect, absolute or conditional, voluntary or involuntary. 11 U.S.C. § 101(54). The definition of "transfer" in the Code was intended to be broad, and includes payment by check. H.R. Rep. No. 595, 95th Cong., 1st Sess. 314, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6270.

II. A DATE OF DELIVERY RULE SHOULD APPLY TO TRANSFERS UNDER 11 U.S.C. § 547(b)

The question presented in this case is when a transfer of interest in property of the debtor occurs where

payment is made by check. 11 U.S.C. § 547(b). The legislative history relating to enactment of the Bankruptcy Code, as well as commercial practice and the policies underlying the Bankruptcy Code support a conclusion that the transfer occurs on the date the check is delivered to the creditor, rather than the date the check is honored by the drawee bank.

A. LEGISLATIVE HISTORY SUPPORTS A DATE OF DELIVERY RULE

The legislative history relating to the 1978 enactment of the Bankruptcy Code establishes that Congress intended that, for purposes of the provisions relating to preferential transfers under 11 U.S.C. § 547, when payment is made by a check, the transfer should be effective on the date of delivery of the check. The report of the House Committee on the Judiciary, in referring to 11 U.S.C. § 547(c), originally indicated that a check is a credit transaction.[3] In separate statements, both

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[3] The House Report states:

> The first exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. *Normally, a check is a credit transaction.* However, for the purposes of this paragraph, a transfer involving a check is considered to be "intended to be contemporaneous" and if the check is presented for payment in the normal course of affairs, which the Uniform Commercial Code specifies as 30 days, U.C.C. § 3-503(2)(a), that will amount to a transfer that is "in fact substantially contemporaneous."

H.R. Rep. No. 595, 95th Cong., 1st Sess. 373, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6329 (emphasis added).

Representative Edwards and Senator DeConcini contradicted the statement in the House Report that payment by a check is normally considered a credit transaction. Both statements provided that "contrary to language contained in the House Report, payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of sections 547(c)(1) and (2)." 124 Cong. Rec. H 11097 (Daily ed. Sept. 28, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at IX-102 (15th Ed. 1991); 125 Cong. Rec. S 17414 (Daily ed. Oct. 6, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at X-29 (15th Ed. 1991).

Although the statements of Representative Edwards and Senator DeConcini were made in the context of Section 547(c), there is nothing in the legislative history indicating congressional intent that a different rule should apply to Section 547(b). To the contrary, the legislative history is a clear indication that the drafters considered a check transaction to be the equivalent of a cash payment, and that a transfer should be considered to be effective upon delivery of the payment. *See, Countryman, The Concept of A Voidable Preference in Bankruptcy,* 38 Vand. L.Rev. 713, 761 (1985); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.),* 909 F.2d 879, 883 (6th Cir. 1990).

The conclusion that Congress intended a date of delivery rule to apply is reinforced by the provisions of 11 U.S.C. § 547(e)(2), which provide that a transfer is made at the time the transfer takes effect between the transferor and the transferee, if the transfer is perfected at or within 10 days after such time. 11 U.S.C.

§ 547(e)(2)(A). Most courts have concluded that 11 U.S.C. § 547(e) applies only to secured transactions, and not to check transactions. *See, e.g., Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805 (5th Cir. 1989); *Durham v. Smith Metal and Iron Co. (In re Continental Commodities, Inc.)*, 841 F.2d 527 (4th Cir. 1988).

However, the provision that a transfer is effective as of the date of the transaction between the debtor and creditor for purposes of 11 U.S.C. § 547(e) is consistent with the legislative history that Congress intended a transfer to be effective for purposes of 11 U.S.C. § 547(c) at the time the debtor delivers the check to the creditor.[4] The consistency of the two sections, that a transfer occurs at the time of the transaction between the debtor and the creditor, is clearly indicative of congressional intent that a date of delivery rule should apply for all purposes under 11 U.S.C. § 547.

B. COMMERCIAL PRACTICE AND THE UNIFORM COMMERCIAL CODE SUPPORT A DATE OF DELIVERY RULE

The provisions of 11 U.S.C. § 547 relating to preferences modified pre-existing law under the former Bankruptcy Act. The modifications were intended to bring bankruptcy law relating to avoidance of preferential transfers "more into conformity with commercial practice

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[4] The provision that the date of transfer relates back to the date of the transaction if the security interest is perfected within ten days is analogous to a date of delivery rule for checks, where the check is presented within the 30 day period for presentment under U.C.C. § 3-503.

and the Uniform Commercial Code." H.R. Rep. No. 595, 95th Cong., 1st Sess. 372, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6328. Both modern commercial practice and the Uniform Commercial Code support adoption of a date of delivery rule as the effective date of transfer.

Under modern commercial practice, for most purposes, payment by check is considered to be a cash transaction and is the end of the commercial transaction. *See, e.g., Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems Corp.)*, 932 F.2d 338, 342 (4th Cir. 1991). "In the commercial world receipt of a check, as distinguished from the date it clears the drawee bank, is customarily looked upon as the date of payment of an obligation." *Young Supply Co. v. McCouth Steel Corp.*, 55 Bankr. 356, 357 (E.D. Mich. 1985). *See, also, Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986). Therefore, under modern commercial practice, transfer is complete when the check is delivered from the debtor to the creditor.

The provisions of the Uniform Commercial Code (U.C.C.), as adopted by the several states, reflect modern commercial practice that, when payment is made by check, the transaction is complete upon delivery.[5] Under the Uniform Commercial Code, the cause of action against the maker of a check accrues upon the date of the check. U.C.C. § 3-122. The check is negotiated to the payee *by delivery* with any necessary endorsement. U.C.C.

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[5] New Mexico has adopted the provisions of the U.C.C. *See*, N.M. Stat.Ann. § 55-1-101 through § 55-12-108 (1978).

§ 3-202. As of the date of delivery, then, the maker of the check has negotiated the check, and a cause of action exists against the maker. While the drawee bank is not obligated to honor the check at that point, the maker of the check is still liable on the instrument. U.C.C. § 3-122.

Where the maker of the check is the debtor, then, as of the date of delivery of the check to the creditor, even though the delivery may be conditional, the debtor has disposed of or parted with property or an interest in property as defined in 11 U.S.C. § 101(54). A rule that the date of delivery is the date of transfer for purposes of 11 U.S.C. § 547(b) accords with the provisions of the Uniform Commercial Code.

III. ADOPTION OF A UNIFORM RULE FOR SECTION 547 FURTHERS BANKRUPTCY POLICIES

The courts have consistently held that, for purposes of determining the date of transfer for the exceptions to the avoidance powers under 11 U.S.C. § 547(c), transfer occurs upon delivery of the check. *See, e.g., Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986); *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 37-38 (1st Cir. 1984). The adoption of a date of delivery rule is based on the legislative history that the drafters intended a date of delivery rule to apply. *See*, statements of Representative Edwards and Senator DeConcini, 124 Cong. Rec. H 11097 (Daily Ed. Sept. 28, 1978); 124 Cong. Rec. S 17414 (Daily Ed. Oct. 6, 1978).

In its decision in this case, the Tenth Circuit Court of Appeals rejected the Bankruptcy Court and District Court's reliance on its prior decision in *White River*. The

Tenth Circuit concluded that, because the purposes of 11 U.S.C. § 547(b) and 11 U.S.C. § 547(c) are different, the date of transfer need not be the same for both sections. (App. to Petition, 4a.) The Tenth Circuit's decisions in *White River* and in this case, then, establish two different rules for the companion provisions of Section 547(b) and Section 547(c).

One of the primary goals of Congress in enacting the 1978 Bankruptcy Code was to establish a uniform law on the subject of bankruptcies. H.R. Rep. No. 595, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963. The express congressional intent that a date of delivery rule apply to 11 U.S.C. § 547(c) and the inclusion of a provision that the date of transfer for secured transactions relates back to the transaction between the debtor and creditor if perfected within 10 days, reflect the congressional goal of uniformity in the bankruptcy laws. Adoption of a date of delivery rule for Section 547(b) further serves to advance this goal of uniformity.

The adoption of a rule that, when payment is made by check, the date of transfer is the date of delivery of the check under Section 547(b) is also consistent with the policies underlying the avoidance provisions of that section. The legislative history establishes that the purpose of Section 547(b) was to promote equality of distribution of the debtor's assets among creditors. The bankruptcy trustee was given the power to avoid certain transfers in order to further that goal. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990). The 90 day period selected by Congress was, however, an arbitrary period. *Yellowhouse Machinery Co. v. Mack (In re Hughes)*,

704 F.2d 820, 822 (5th Cir. 1983). Adoption of a rule governing whether a particular check transaction falls in or out of that arbitrary period does not alter the trustee's avoidance powers. Although a particular transfer may not be voidable, because the effective date of the transaction falls outside the 90 day period, the adoption of a date of delivery rule does not limit the avoidance power nor alter equality of distribution of assets to other creditors.

IV. THE UNIFORM COMMERCIAL CODE SHOULD NOT LIMIT THE DEFINITION OF TRANSFER

The Tenth Circuit, in its decision below, relied on U.C.C. § 3-409(1) to support its determination that the effective date of transfer should be the date the drawee bank honors the check. (App. to Petition, 8a-10a.) U.C.C. § 3-409(1) states that "a check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." Although it was clearly Congress' intent to create greater uniformity between the bankruptcy laws and the Uniform Commercial Code as adopted by the states, the question of when a transfer occurs under the Bankruptcy Code is a federal question requiring construction of a federal statute. *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990). *See, e.g., Toibb v. Radloff*, ___ U.S. ___, 111 S.Ct. 2150 (1991).

The definition of "transfer" contained in the Bankruptcy Code is a broad definition. The definition includes every mode of disposing of or parting with property,

regardless of whether the transfer is absolute or conditional. 11 U.S.C. § 101(54). The House Report indicates that, in defining the term "transfer," Congress intended to delete all potentially limiting words from the definition. H.R. Rep. No. 595, 95th Cong., 1st Sess. 314, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6270.

The Tenth Circuit Court, relying on U.C.C. § 3-409(1), indicated that a date of honor rule ought to apply because, until a check is actually accepted, circumstances could ensure that a transfer never be made, such as garnishment of the bank account, or a stop-payment order by the debtor. (App. to Petition, 9a.) The fact that intervening circumstances between the date of delivery and the date of honor could prevent the transfer, however, should not, for two reasons, serve as a basis for adoption of the date of honor rule. First, if no transfer occurs, there is no cause of action for avoidance of a preferential transfer. A rule governing the time when a transfer occurs under 11 U.S.C. § 547 should not be adopted based on hypothetical circumstances that could never invoke application of the provisions of Section 547.

Second, the fact that post-delivery circumstances may arise to prevent a transfer only means that delivery of the check is a conditional transfer. By analogy, a rule which gives effect to the date of delivery of the check as the date of transfer, if the check is ultimately honored, is no different than the relation back provision of 11 U.S.C. § 547(e) providing that the transfer relates back to the date of the transaction if the security interest is perfected within 10 days. *See, e.g., Global International Airways Corp. v. Evergreen Air Center, Inc. (In re Global International Airways*

Corp.), 80 Bankr. 990, 995 at n.9 (Bankr. W.D. Mo. 1987). *See, also,* U.C.C. § 3-503.

The definition of "transfer" in the Bankruptcy Code clearly contemplates that conditional payments be included in the definition. 11 U.S.C. § 101(54). Requiring that the check be honored by the drawee bank before a transfer will be deemed to have occurred requires that the transfer be absolute. The date of honor rule, then, effectively reads a limitation into the definition of "transfer," contrary to express legislative intent to remove all limiting language from the definition of transfer in the Bankruptcy Code.

V. EASE OF PROOF AND MANIPULATION ARE NOT GROUNDS FOR A DATE OF HONOR RULE

The Tenth Circuit based its holding in part on a finding that (1) a date of honor rule is easier to prove, and (2) that adoption of the date of delivery as the effective date of transfer would make transactions more susceptible to manipulation by a debtor. (App. to Petition, 10a-11a.) The two grounds articulated by the Tenth Circuit are not proper grounds for deciding the question in this case.

The issue presented by this case is a question calling for construction of federal statutory law. *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990). Resolution of a question of federal statutory law should be based on principles of statutory construction and legislative intent as established by the legislative history. Questions relating to the trustee's burden of

proof, however, are governed by the Federal Rules of Evidence. Fed.R.Evid. 101. The rule of law established by the decision in this case should be based on statutory construction of the Bankruptcy Code, rather than evidentiary considerations. *Pauley v. Bethenergy Mines, Inc.*, ___ U.S. ___, 111 S.Ct. 2524, 2533 (1991).

The fact that a debtor with knowledge of the 90 day preference period under the Bankruptcy Code can manipulate the date of delivery to prefer one creditor over another is similarly not a basis for adopting either a date of delivery or a date of honor rule when payment is made by check. First, a knowledgeable debtor controls the date of transfer and can prefer one creditor over another regardless of whether payment is made by check or by some other medium. *See, e.g.*, 11 U.S.C. § 547(e). Different rules should not be adopted based solely on the fact that the medium of payment is a check.

Further, under a date of honor rule, the transfer date is also subject to manipulation. Applying a date of honor rule, rather than a date of delivery rule, a drawee bank, which is also a creditor and which has inside knowledge of the debtor's financial condition, would be able to manipulate the date of transfer, thereby bringing transactions within the 90 day period that ordinarily would not have constituted preferential transfers. *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 882, n.2 (6th Cir. 1990). *See, also, Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 634 (10th Cir. 1986), indicating that a holding that the transfer occurs on the date the check is delivered allows the debtor, as opposed to the bank, to determine the precise date of transfer.

CONCLUSION

For purposes of establishing a voidable preference under 11 U.S.C. § 547(b), when payment is made by check, the effective date of transfer should be the date the check is delivered to the creditor, rather than the date the check is honored by the payee bank. Adoption of a date of delivery rule is supported by the legislative history that Congress intended payments by check to be the equivalent of cash transactions in conformity with modern commercial practice and the Uniform Commercial Code. Adoption of a date of delivery rule also furthers congressional purposes of uniformity in operation and application of the bankruptcy laws. Therefore, the petitioner, William Barnhill, would respectfully request that this Court reverse the decision of the United States Court of Appeals for the Tenth Circuit, and remand the case for dismissal in accordance with the March 1, 1989 Order of the United States Bankruptcy Court for the District of New Mexico.

Respectfully Submitted,

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No. 91-159

In The

Supreme Court of the United States

October Term, 1991

IN RE ALAN J. AND MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE & SUPPLY, a general partnership, and MORRIS R. ANTWEIL,

Debtors.

WILLIAM BARNHILL,

Petitioner,

v.

ELLIOTT JOHNSON, Trustee,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. ONLY UNDER THE BANKRUPTCY CODE HAVE SOME CIRCUITS HAD DIFFICULTY WITH THE CONCEPT THAT DELIVERY OF A CHECK DOES NOT CONSTITUTE A TRANSFER OR ASSIGNMENT OF FUNDS 16

II. THE UNAMBIGUOUS LANGUAGE OF SECTION 547 REQUIRES THE UTILIZATION OF A DATE OF HONOR RULE 12

A. SECTION 547(b) DOES NOT, BY ITSELF, DEFINE WHEN A TRANSFER IS MADE.. 13

B. SECTION 547(e) AND APPLICABLE STATE LAW DEFINE WHEN AN AVOIDABLE TRANSFER IS "MADE." 13

1. SECTION 547(e) DOES NOT FULLY ANSWER THE QUESTION PRESENTED 13

2. UNDER STATE LAW, THE TRANSFER OF AN INTEREST OF THE DEBTOR IN PROPERTY TAKES PLACE WHEN A CHECK IS HONORED 16

TABLE OF CONTENTS – Continued

Page

3. THE SECTION 547(e) ANALYSIS IS NOT LIMITED TO LIENS AND SECURITY INTERESTS 19

C. THE EXPRESS PROVISIONS OF SECTION 547(b) AND APPLICABLE STATE LAW DEMAND THAT THE DATE OF HONOR BE RECOGNIZED AS THE DATE A TRANSFER BY CHECK IS MADE 21

III. THE LEGISLATIVE HISTORY RELIED UPON BY PETITIONER IS IRRELEVANT TO THE QUESTION PRESENTED 26

IV. POLICY ARGUMENTS SUPPORT THE CONCLUSION THAT A TRANSFER BY CHECK OCCURS WHEN THE CHECK IS HONORED.. 30

A. THE POLICY OF EQUALITY OF DISTRIBUTION IS FURTHERED BY TRANSFER ON DATE OF HONOR RULE 30

B. THE DATE OF HONOR RULE CONFORMS WITH THE UNIFORM COMMERCIAL CODE..... 31

C. COMMERCIAL EXPECTATIONS ARE NOT CLEARLY DEFINED AS TO THE QUESTION PRESENTED AND, IN ANY EVENT, SHOULD BE ADDRESSED IN SECTION 547(c) IF IN CONFLICT WITH THE U.C.C. 32

D. THE POLICY OF HAVING UNIFORM BANKRUPTCY LAWS HAS NOTHING TO DO WITH THE QUESTION PRESENTED.. 34

TABLE OF CONTENTS – Continued

Page

V. THE EASE OF PROOF AND MANIPULATION FACTORS SUPPORT THE TENTH CIRCUIT'S DECISION 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Bass v. Olson, 378 F.2d 818 (9th Cir. 1967) 11

Begier v. Internal Revenue Service, ___ U.S. ___, 110 S.Ct. 2258 (1990) 8, 22, 30

Bernstein v. RJL Leasing (In re White River Corp.), 799 F.2d 631 (10th Cir. 1986) 5, 6, 33

Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.), 850 F.2d 1275, 1280 (8th Cir. 1988) 33

Blum v. Stenson, 465 U.S. 886 (1984) 20, 28

Butner v. United States, 440 U.S. 48 (1979) 23, 34, 35

Cirar v. Bank of Hartshorne, 567 P.2d 96 (Okla. 1977) 25

Consumer Product Safety Comm'n v. GTE Sylvania Inc., 447 U.S. 102 (1980) 28

Corn Exch. Nat. Bank & T. Co. v. Klauder, 318 U.S. 434 (1943) 15

Dickenson v. Owens-Corning Fiberglass Corp. (In re Insulation Materials, Inc.), 47 Bankr. 832 (Bankr. E.D. Tenn. 1985) 19

Duke v. Sun Oil Co., 320 F.2d 853 (5th Cir. 1963) 11

Durham v. Smith Metal and Iron Co. (In re Continental Commodities, Inc.), 841 F.2d 527 (4th Cir. 1988) 19, 20

Eisenberg v. J L International, Ltd. (In re Sider Ventures & Services Corp.), 47 Bankr. 406 (S.D.N.Y. 1985) 18, 19

Engstrom v. Wiley, 191 F.2d 684 (9th Cir. 1951) 12

TABLE OF AUTHORITIES – Continued

Page

First American National Bank v. Commerce Union Bank, 692 S.W.2d 642 (Tenn. Ct. App. 1985) 25

Fitzpatrick v. Philco Finance Corp., 491 F.2d 1288 (7th Cir. 1974) 11

Gelco Corp. v. United National Bank, 569 So.2d 502 (Fla. Dist. Ct. App. 1990) 18, 25

In re Lyon, 121 F. 723 (2d Cir. 1903) 11

Johnson v. Home State Bank, ___ U.S. ___, 111 S.Ct. 2150 (1991) 29

Klein v. Tabatchnick, 610 F.2d 1043 (2d Cir. 1979) 11

Kupetz v. Elaine Monroe Associates, Inc. (In re Wolf & Vine), 825 F.2d 197 (9th Cir. 1987) 10, 36

Lewis v. Manufacturers National Bank, 364 U.S. 603 (1961) 35

McKenzie v. Irving Trust Co., 323 U.S. 365 (1944) 15

Nicholson v. First Investment Co., 705 F.2d 410 (11th Cir. 1983) 11

Official Unsecured Creditors Committee v. Shaler Corp. (In re Belknap, Inc.), 909 F.2d 879 (6th Cir. 1990) 35, 36

Port City State Bank v. American National Bank, 486 F.2d 196 (10th Cir. 1973) 11, 25

Shamrock Golf Co. v. Richcraft, Inc., 680 F.2d 645 (9th Cir. 1982) 11, 32

Tidwell v. Atlanta Gas Light Co. (Matter of Georgia Steel, Inc.), 38 Bankr. 829 (Bankr. M.D. Ga. 1984) 18

Toibb v. Radloff, ___ U.S. ___, 111 S.Ct. 2197 (1991) 20, 28

TABLE OF AUTHORITIES – Continued

Page

United States v. Forcellati, 610 F.2d 25 (1st Cir. 1979) .12, 26

United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) 23, 24

United States v. $4,255,000, 762 F.2d 895 (11th Cir. 1985) 12, 25

W.B. Farms v. Fremont National Bank and Trust Co., 756 F.2d 663 (8th Cir. 1985) 10, 11

Wall v. Mutual Life Insurance Co., 467 F.2d 321 (5th Cir. 1972) 11

Ward v. Federal Kemper Insurance Co., 62 Md.App. 351, 489 A.2d 91 (1985) 25

Watchmaker v. Barnes, 259 F. 783 (1st Cir. 1919) 11

Young Supply Co. v. McLouth Steel Corp., 55 Bankr. 356 (E.D. Mich. 1985) 32

United States Statutes

11 U.S.C. § 101(48) (1984 ed.) 2, 25

11 U.S.C. § 101(54) 2, 3

11 U.S.C. § 502 26

11 U.S.C. § 507 31

11 U.S.C. § 541 .....22, 23

11 U.S.C. § 547 ..... 7, 12, 20, 30

11 U.S.C. § 547(b) ..... *passim*

11 U.S.C. § 547(c) ..... *passim*

11 U.S.C. § 547(e) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 547(g) 8, 9

12 U.S.C. § 4002 37

21 U.S.C. § 881 12

Uniform Commercial Code

U.C.C. § 2-511 17

U.C.C. § 3-104 17

U.C.C. § 3-114 17

U.C.C. § 3-122 25

U.C.C. § 3-408 (Revised Art. 3, 1990) 17

U.C.C. § 3-409 .....16, 17, 18, 19, 31

U.C.C. § 3-410 17

U.C.C. § 3-413 .....17, 22

U.C.C. § 3-503 27

U.C.C. § 3-802 24

U.C.C. § 4-104 37

U.C.C. § 4-108 37

U.C.C. § 4-301 37

U.C.C. § 4-302 .....18, 37

U.C.C. § 4-303 .....18, 24, 25

U.C.C. § 4-403 24

Florida Statutes

§ 673.409 Fla. Stat. (1989) 18

TABLE OF AUTHORITIES – Continued

Page

New Mexico Statutes

§ 59A-30-5.1 N.M.S.A. 1978 (1991 Supp.) 33

Rules

Bankr. R. Pro. 3002 26

Legislative Materials

H.R. Rep. No. 595, 95th Cong., 1st Sess. 24, 27, 32

S. Rep. No. 989, 95th Cong., 2d Sess 15, 20, 24, 34

S. Rep. No. 65, 98th Cong., 1st Sess. 22

124 Cong. H 11089-115 (daily ed. Sept. 28, 1978) (Comments of Rep. Edwards) 16, 27, 29

125 Cong. Rec. S 17406-32 (daily ed. Oct. 6, 1978) (Comments of Sen. DeConcini) 27, 29

Pub. L. No. 101-311 2

Pub. L. No. 101-647 3

Other Materials

Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713 (1985) .9, 17, 19, 27, 28

Uniform Commercial Code (U.L.A.) (West 1991) 17

JURISDICTIONAL STATEMENT

Petitioner's Jurisdictional Statement is accurate but incomplete. Brief of Petitioner at 1-2. In addition to the jurisdictional facts noted by Petitioner, it should be added that Respondent was appointed Trustee in Bankruptcy of the Chapter 11 Bankruptcy Estates of Alan and May Frances Antweil, Morris R. Antweil and Hobbs Pipe and Supply, a general partnership of Alan J. and Morris R. Antweil, on May 15, 1986 which appointment Respondent accepted on June 3, 1986. (J.A. 1).

STATUTES INVOLVED

In addition to the statutory provisions set forth by Petitioner, this case involves the provisions of 11 U.S.C. § 547(e) which provides as follows:

11 U.S.C. § 547

. . .

(e)(1) For purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire

a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

Also, while the definition of "transfer" as found in U.S.C. § 101 has not changed, it was codified at 11 U.S.C. § 101(48) on February 18, 1986. In subsequent redesignations, it later became one of the two definitions presently identified as 11 U.S.C. § 101(54).[1] Other than this minor

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[1] In 1990, Congress added eight new definitions to 11 U.S.C. § 101 in two separate acts, Pub. L. Nos. 101-311 and

(Continued on following page)

matter, the question of which version of the Bankruptcy Code may be applicable does not appear to be significant since there have been no amendments to any relevant provision between 1986 and the present.

STATEMENT OF THE CASE

Alan J. and Mary Frances Antweil, Morris R. Antweil, and Hobbs Pipe and Supply, a general partnership of Alan J. and Morris R. Antweil, ("the Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on February 18, 1986 in the United States Bankruptcy Court for the District of New Mexico. (J.A. 1). The Respondent, Elliott Johnson ("the Trustee"), was appointed Chapter 11 Trustee in Bankruptcy of the Debtors' jointly administered estates on May 15, 1986, and accepted this appointment on June 3, 1986. (J.A. 1). A consolidated Chapter 11 Plan for the Debtors' estates was confirmed by the Bankruptcy Court on May 6, 1988. (J.A. 1).

On May 12, 1988, the Trustee brought an adversary proceeding against certain defendants, including Petitioner William Barnhill ("Petitioner"), by filing a Complaint to Recover Preferential Transfers. (J.A. 1). In the count of the complaint applicable to the Petitioner, the Trustee sought to avoid as preferential a transfer made to

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(Continued from previous page)

101-647. The interaction between those two acts resulted in the definitions of "stockbroker" and "transfer" both being identified by 11 U.S.C. § 101(54).

the Petitioner in the amount of $157,148.22 by check dated November 19, 1985. (J.A. 6, Paras. 5 and 6). The other Defendants are not parties to the proceedings on appeal and the Trustee's claims against them are not at issue.

On June 17, 1988, Petitioner filed a Motion to Dismiss the Trustee's complaint against him contending that the Complaint failed to state a claim upon which relief could be granted and that the Bankruptcy Court lacked subject matter jurisdiction over the property. (J.A. 16-17). On October 6, 1988, with leave of the Bankruptcy Court, the Trustee filed a First Amended Complaint to Recover Preferential Transfers which did not alter his allegations against the Petitioner. (J.A. 1, 19-29).

On October 11, 1988, the Trustee filed a Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers with the proposed Second Amended Complaint attached as an exhibit to the Motion. (J.A. 2, 30-40). In his Motion, the Trustee alleged that he had reexamined certain evidence and believed that the evidence provided a basis for asserting, against the Petitioner, an alternative transfer date of November 20, 1985. (J.A. 31, Para. 1). In the proposed Second Amended Complaint, the Trustee alleged that the check at issue was delivered to Petitioner on November 18, 1985, dated November 19, 1985, and honored by the drawee bank on November 20, 1985. (J.A. 36, Para. 7). In proposing these amendments, the Trustee assumed that November 20, 1985 was the 90th day before the filing of

Debtors' petitions.[2] The Trustee reasoned that November 20, 1985 was the date of transfer since under Section 547(b)(4) transfer occurs upon honor for all checks or, alternatively, for post-dated checks.

Petitioner filed an Objection to the Trustee's Motion on October 13, 1988. (J.A. 2). Petitioner contended that the transfer occurred either on November 18 or 19, 1985 and, regardless of which of the two dates were used, the Trustee could not avoid the transfer. (J.A. 42). Also on October 13, 1988, Petitioner filed a second Motion to Dismiss directed at the First Amended Complaint. (J.A. 2). The grounds advanced by Petitioner for dismissal remained the same. At no time has Petitioner filed an answer or any other pleading which alleged that one of the Section 547(c) exceptions is relevant to the Trustee's action against him.

On March 1, 1989, the Bankruptcy Court entered its order denying the Trustee's Motion for leave to file his proposed Second Amended Complaint and granted Petitioner's Motions to Dismiss. (J.A. 49, 51). Accompanying the Bankruptcy Court's order was its Memorandum Opinion. (App. C to Petition at 24a). The Bankruptcy Court opined that the Tenth Circuit's decision in *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th

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[2] In the proceedings below, there was a dispute as to what date was the 90th day prior to the filing of Debtors' petitions. However, that issue was not pursued beyond the District Court. Based upon the District Court's ruling, the parties agree that November 20, 1985 is the 90th day before the date of the filing of the petitions for purposes of Section 547(b)(4)(A). *See* (App. B to Petition at 13a-14a, n. 1) (briefly describing the history of this issue).

Cir. 1986), was controlling so that the date a check is delivered is the date of transfer for purposes of Section 547(b)(4). (App. C to Petition at 26a-27a). Additionally, the Bankruptcy Court held that a transfer by check occurs on the date a check is received or is dated, whichever is later. (*Id.* at 26a).

On March 10, 1989, the Trustee appealed the decisions by the Bankruptcy Court to the United States District Court for the District of New Mexico. (J.A. 2). The District Court affirmed the rulings of the Bankruptcy Court in its Memorandum Opinion and Order entered on February 27, 1990. On the Question Presented for Review in this case, the District Court found the Tenth Circuit's reasoning in *Bernstein v. RJL Leasing, supra*, persuasive and affirmed the adoption of a date of delivery rule for purposes of Section 547(b)(4)(A). (App. B to Petition at 16a-19a). As to the postdated check issue, the District Court held that the date of delivery rule should apply if the parties intended to rely on the check as a cash transaction and went on to find that, given the one day lapses between the date of delivery, the date on the face of the check and the date of honor, the parties intended a cash payment. (*Id.* at 21a-22a).

The Trustee filed a Notice of Appeal as to the District Court's decision on March 29, 1990. (J.A. 3). In addition to the two theories raised at the Bankruptcy Court and the District Court, the Trustee also appealed on the ground that the District Court had made an impermissible finding of fact regarding the intent of the parties to create a cash transaction since no evidence was ever presented regarding the intent of the parties or any other issue. On April 30, 1991, the United States Court of Appeals for the

Tenth Circuit filed its Opinion in which it concluded that the date of honor was the date of transfer for purposes of Section 547(b)(4). This decision rendered moot the issues raised in the Trustee's appeal relating to post-dated checks, which issues are not now before this Court. *See* Respondent's Brief in Opposition at 3.

SUMMARY OF THE ARGUMENT

In support of his contention that the decision of the Tenth Circuit should be overturned, Petitioner advances three principal rationale: the date of delivery approach is endorsed by the legislative history; that approach is consistent with the definition of "transfer" found in the Bankruptcy Code; and, the date of honor approach is inconsistent with congressional policy of creating a preference section which conforms to commercial practice. Petitioner's position ignores the express provisions of Section 547. The plain language of both subsection (b) and subsection (e), together with reference to applicable state law, confirms the Tenth Circuit's decision that a transfer by check occurs when the check is honored for purposes of Section 547(b).

Reference to the legislative history is unnecessary. The language of subsections (b) and (e) is unambiguous. Additionally, the legislative history relied upon by Petitioner does not pertain to Section 547(b), but instead is expressly limited to certain of the preference exceptions found in subsection (c).

A stated policy behind Section 547 was to bring preference law more into conformity with the Uniform

Commercial Code ("the U.C.C.") and commercial practice. The U.C.C. clearly supports a date of honor approach, while commercial practice, taken in a light most favorable to Petitioner, does not clearly favor either approach. To the extent some commercial practice supports a date of delivery rule, effectuation of the policy of conforming the preference statute to such commercial practice is best left to the subsection (c) exceptions. Utilizing a date of honor approach under subsection (b) is the only way to avoid a needless conflict between the policies underlying the preference statute.

ARGUMENT

It is undisputed that the primary policy of the Bankruptcy Code is to promote equality of distribution among creditors. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990) (hereinafter cited as "*Begier*"). In order to further that end, Congress enacted the preference provision by which a trustee in bankruptcy can compel disgorgement of property transferred by the debtor to persons who are not insiders on or within 90 days before the filing of the debtor's bankruptcy petition. *Id.* at 2263; 11 U.S.C. § 547(b). The recapture of such property by a trustee enhances the value of the estate for all of the creditors.

In order to so recover a transfer, a trustee must establish all of the elements of Section 547(b). 11 U.S.C. § 547(g). Additionally, even if a trustee has discharged his burden under Section 547(b), he may not avoid a transfer if the creditor or party from whom recovery is sought

establishes all of the elements of one of the seven exceptions enumerated in Section 547(c). *Id.* at (g).

In order to ensure use of the preference avoidance power in a manner best designed to effectuate equality of distribution and economical utilization of the resources of a debtor's estate, Congress restricted a trustee's preference avoidance powers to transfers "of an interest of the debtor in property." 11 U.S.C. § 547(b). Thus, a trustee does not have the power to avoid any action which may have the effect of creating a mere claim against the estate. Instead, a trustee only can avoid those transfers of interests in property which actually deplete the estate, the avoidance of which would affirmatively cause assets to be returned to the estate. Once recovered, those assets later would be distributed to the creditors under the priorities set forth in the Bankruptcy Code.

The date a debtor delivers its check[3] to a creditor is immaterial. Instead, equality of distribution is compromised only if and when the drawee bank honors the check thereby resulting in a concomitant reduction in the

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[3] This case involves a debtor who delivered a check drawn on its own account to a creditor. The Trustee does not intend his arguments herein to be understood to apply to situations where a debtor delivers a cashier's check, a certified check, or a third party check (i.e. a check written by another, made payable to the debtor, and endorsed and delivered by the debtor to a creditor). Each such situation might be sufficiently distinguishable from the present case so as to demand another result. Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713, 762-63 n. 266 (1985) (hereinafter cited as "Countryman, *Voidable Preference* at ___").

drawer/debtor's account with the drawee bank.[4] In this case, $157,148.22 ceased to be available for administration in the Debtors' combined estates for the benefit of all creditors and was transferred to or for the benefit of Petitioner on the date the check at issue was honored. Accordingly, the date of honor is the date that an interest of the Debtors in property was transferred for purposes of Section 547(b)(4).

I. ONLY UNDER THE BANKRUPTCY CODE HAVE SOME CIRCUITS HAD DIFFICULTY WITH THE CONCEPT THAT DELIVERY OF A CHECK DOES NOT CONSTITUTE A TRANSFER OR ASSIGNMENT OF FUNDS.

In discussing Circuit authority under the Bankruptcy Code, Petitioner fails to note that in the Ninth Circuit, under Section 547(b) the date of delivery only controls when a check is honored within a "reasonable time." *Kupetz v. Elaine Monroe Associates, Inc. (In re Wolf & Vine)*, 825 F.2d 197, 202 (9th Cir. 1987). In the Ninth Circuit, the delay between delivery and honor "can be no longer than thirty days" and in instances where the delay exceeds

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[4] As the Eighth Circuit has succinctly observed, describing the honor of a check as reducing an account is not entirely accurate: "In fact, drawers have no money in banks. Only bankers have money in banks. Drawers have choses in action against banks." *W.B. Farms v. Fremont National Bank and Trust Co.*, 756 F.2d 663, 666 (8th Cir. 1985). That being said, the Trustee will continue to utilize the more common formulation of account reduction herein as there is no substantive difference if the transfer avoided is from the Debtors' account or is a reduction of Debtors' chose of action against a bank.

thirty days, the date of honor is deemed to be the date of transfer. *Id.* at 202. Otherwise, Petitioner accurately summarizes the conflicting Circuit authority as to the Question Presented. Brief of Petitioner at 10.

Under the former Bankruptcy Act, four Circuits confronted the issue of if and when a preferential transfer occurs when a debtor makes a check and those courts unanimously found that no preferential transfer occurs unless and until the check is honored. *Nicholson v. First Investment Co.*, 705 F.2d 410, 412-13 (11th Cir. 1983); *Klein v. Tabatchnick*, 610 F.2d 1043, 1049 (2d Cir. 1979) (no preference occurred where the debtor delivered a check which was never honored); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288, 1293 (7th Cir. 1974); *Watchmaker v. Barnes*, 259 F. 783, 788 (1st Cir. 1919) (involving a post-dated check); and, *In re Lyon*, 121 F. 723, 726 (2d Cir. 1903) (involving a post-dated check). *See also, Bass v. Olson*, 378 F.2d 818, 820 (9th Cir. 1967) (possession of an uncashed check is not a payment). *But see, Shamrock Golf Co. v. Richcraft, Inc.*, 680 F.2d 645, 646 (9th Cir. 1982) (indicating in *dicta* that a transfer occurs upon delivery of a check).

Additionally, in other civil proceedings, various Circuits have nearly unanimously found that checks are not transfers of funds unless and until they are accepted by the drawee bank. *See W.B. Farms v. Fremont National Bank and Trust Co., supra*, 756 F.2d at 666 (checks are not assignments of a drawer's funds under Nebraska law); *Port City State Bank v. American National Bank*, 486 F.2d 196, 201 (10th Cir. 1973) (same under Oklahoma law); *Wall v. Mutual Life Insurance Co.*, 467 F.2d 321, 424 (5th Cir. 1972) (delivery of a check is not payment under Georgia law); and, *Duke v. Sun Oil Co.*, 320 F.2d 853, 861 (5th Cir. 1963)

(check is only a conditional payment until honored under Texas law). *But see Engstrom v. Wiley*, 191 F.2d 684, 686 (9th Cir. 1951) (under Washington preference statutes, a check is equivalent of cash and no preference occurs in a cash sale).

The Circuits have also recognized in criminal contexts that the delivery of the check does not constitute payment or transfer or assign any funds of the drawer. *See United States v. $4,255,000*, 762 F.2d 895, 907 (11th Cir. 1985) (in a forfeiture action brought pursuant to Section 511(a)(6) of the Comprehensive Drug Abuse Prevention Control Act of 1970 (21 U.S.C. § 881(a)(6)), holders of checks written on the seized account have no ownership or possessory interest in the seized funds since checks are not assignments); and, *United States v. Forcellati*, 610 F.2d 25, 31 (1st Cir. 1979) (defendant guilty of a misdemeanor of disposing of property of the United States when he intercepted a Treasury check payable to a third party from the mail and cashed it since funds remained property of the government).

II. THE UNAMBIGUOUS LANGUAGE OF SECTION 547 REQUIRES THE UTILIZATION OF A DATE OF HONOR RULE.

The unambiguous provisions of Section 547 together with applicable state law in the form of the U.C.C, make clear that a transfer by check takes place for purposes of Section 547(b) if and when the check is honored.

A. SECTION 547(b) DOES NOT, BY ITSELF, DEFINE WHEN A TRANSFER IS MADE.

Subject to the provisions of Section 547(c) and to a trustee's satisfactory discharge of his burden of proof on the other four elements of a preferential transfer, "the Trustee may avoid any transfer of an interest of the debtor in property made on or within 90 days before the date of the filing of the Petition." 11 U.S.C. § 547(b)(4)(A). Thus, where a debtor delivers a check to another, the issue becomes when the transfer of an interest of the debtor in property is "made."

B. SECTION 547(e) AND APPLICABLE STATE LAW DEFINE WHEN AN AVOIDABLE TRANSFER IS "MADE."

Section 547(e), by its express, unambiguous terms, defines when a transfer of an interest of the debtor in property "is made" for purposes of Section 547. In so defining, Section 547(e) requires reference to state law.

1. SECTION 547(e) DOES NOT FULLY ANSWER THE QUESTION PRESENTED.

There are three conceivable dates of transfer in this case: November 18, 1985, which is the date of delivery; November 19, 1985, which is the date appearing on the face of the check; and, November 20, 1985, which is the date of honor. Given that the parties agree that the transfer was "made" prior to the filing of the Debtors' petitions, Section 547 answers the question of when a transfer is made as follows:

> For purposes of this section, except as provided in Paragraph (3) of this subsection, a transfer is made –
>
> (A) at the time such transfer takes affect between the transferor and the transferee, if such transfer is perfected at, or within ten days after, such time; [or,]
>
> (B) at such time such transfer is perfected, if such transfer is perfected after such ten days; . . .

11 U.S.C. § 547(e)(2).[5] However, rather than completely answering the question, this provision creates two other questions. Specifically, the issues then become: (i) when a transfer by check takes effect between the transferor and the transferee; and, (ii) when such a transfer becomes perfected.

As to the latter question, Section 547(e) provides further direction: "For purposes of this section, a transfer of . . . property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." *Id.* at (e)(1)(B). Thus, the second question emerging from Section 547(e)(2) is refined to being an inquiry of when a creditor on a simple contract cannot acquire a judicial lien

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[5] Section 547(e)(3) provides that "a transfer is not made until a debtor has acquired rights in the property transferred." Under the date of delivery approach advocated by Petitioner, Paragraph (3) clearly adds the additional area of inquiry of when the debtor "acquired rights" in the funds which were used to pay the check upon honor. If no such rights had been acquired at the time of delivery, the date of delivery cannot control.

to the money in the debtors bank account that is superior to the interest of the payee of the check.

The Bankruptcy Code provides no further guidance regarding the answers to these questions. When confronted with an almost identical problem under the preference provisions of the Bankruptcy Act, this Court determined that Congress intended such issues to be controlled by state law:

> In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of state law. And hence § 60(a)'s 'apparent command is to test the effectiveness of a transfer, as against the Trustee, by the standards which applicable state law would enforce against a good faith purchaser.' *Corn Exch. Nat. Bank & T. Co. v. Klauder*, 318 U.S. 434, 436 . . . Section 60(a) in this respect, as do numerous other federal statutes . . . thus adopts state law as the rule of decision. The state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected.

McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1944) (some citations omitted).

There is no indication in the text of Section 547(e) that Congress intended for a different analysis to be utilized when it adopted the Bankruptcy Code. Indeed, the legislative history appears to confirm that the *McKenzie* approach is still valid and that reference to state law is necessary to complete any analysis under Section 547(e). *See* S. Rep. No. 989, 95th Cong., 2d Sess. 89, *reprinted in* King, *Collier on Bankruptcy*, App. 3 at V-89

(15th ed. 1991) ("Subsection (e) is designed to reach different results under the 1962 version of Article 9 and under the 1972 version . . . ") (hereinafter cited as "S. Rep. No. 989" and "*Collier*" respectively); and, 124 Cong. H 11097 (daily ed. Sept. 28, 1978) (Comments of Rep. Edwards) *reprinted in Collier, supra*, App. 3 at IX-103 (discussing the interaction of Section 547(e)(1)(B) and bulk sales law). Accordingly, one must refer to state law in order to answer the questions of when a transfer by check takes effect between the drawer and the payee and when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the payee in the check.

2. UNDER STATE LAW, THE TRANSFER OF AN INTEREST OF THE DEBTOR IN PROPERTY TAKES PLACE WHEN THE CHECK IS HONORED.

In each of the states, the law of negotiable instruments, including checks, is governed by Article 3 of the U.C.C.[6]

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[6] There is neither any stipulation in the record nor sufficient facts alleged in the Trustee's Second Amended Complaint for this Court to determine which state's law would apply in this case. However, the Trustee does not believe that any such determination is necessary. All fifty states have adopted Article 3 of the U.C.C. and there does not appear to be any material deviation among the several states from the uniform provisions of Article 3 discussed herein. For instance, all fifty states, the District of Columbia, Guam and the Virgin Islands have adopted the uniform version of Section 3-409(1), which is the

(Continued on following page)

Under state law, a check is a writing that: is signed by the drawer; contains an unconditional order to pay a sum certain in money and in which no other promise, order, obligation or power is given by the drawer except as authorized by Article 3; is payable on demand;[7] is payable to order or to bearer; and, is drawn on a bank. U.C.C. § 3-104. By delivering a check to a payee, a drawer "only gives the creditor a contingent promise under U.C.C. § 3-413(2) to pay the creditor if the drawee bank does not." Countryman, *Voidable Preference* at 762. Section 3-409(1) clearly states that a drawer does not part with any funds by delivering a check: "A check . . . does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." Acceptance of a check only can occur under Section 3-410 by

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controlling provision in this case. U.C.C. (2A U.L.A.) (West 1991) at 1-2 and at § 3-409. Apparently no state has adopted Revised Article 3, which was approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1990, under which § 3-409(1) is merely redesignated as § 3-408. U.C.C. (2 U.L.A.) (West 1991) at § 3-408.

[7] While the Trustee believes that the issues are not before this Court (*see* Respondent's Brief in Opposition at 3), it should be noted that this requirement renders the term "post-dated check" an oxymoron. Specifically, a check which is post-dated is not payable until its stated date. U.C.C. § 3-114(2). "[A] check post-dated by even one day" is "a credit instrument." Official Comment to U.C.C. § 2-511 at ¶ 6. Thus, even if this Court reverses the decision of the Tenth Circuit and holds that a check is transferred upon delivery for purposes of Section 547(b), there remain issues on appeal to be ruled upon by the Tenth Circuit since a "post-dated check" is not a check.

"the drawee's signed engagement to honor the draft as presented" or under Section 4-302 where the drawee bank fails to timely dishonor the instrument.

As to the issue of perfection, under applicable state law it is quite clear that prior to the drawee honoring the check a creditor can obtain a lien superior to the claim of the payee. The case of *Gelco Corp. v. United National Bank*, 569 So.2d 502 (Fla. Dist. Ct. App. 1990), which involved a prejudgment writ of garnishment, is quite illustrative. In that case, a writ of garnishment was served on the drawee bank six days after a check had been delivered to the payee and on the same day that the check was presented to the drawee bank for payment, but prior to drawee's acceptance. *Id.* at 503. The bank's dishonor of the check in favor of the garnishor was held to be appropriate since a check does not operate as an assignment of funds in law or equity. *Id.* at 503-04, citing § 673.409(1) Fla. Stat. (1989) (Florida's codification of U.C.C. § 3-409(1)). *See also* U.C.C. § 4-303(1) (delineating when a drawee bank must refuse to honor checks drawn on a customer's account after receiving legal process).

Courts applying the Section 547(e) requirements to transfers by check have apparently not had any difficulty with the concept that the transfer is "perfected" upon the acceptance of honor of the check by the drawee bank. *See e.g., Tidwell v. Atlanta Gas Light Co. (Matter of Georgia Steel, Inc.)*, 38 Bankr. 829, 833 (Bankr. M.D. Ga. 1984); and, *Eisenberg v. J L International, Ltd. (In re Sider Ventures & Services Corp.)*, 47 Bankr. 406, 407 (S.D.N.Y. 1985). Instead, differences exist between those courts since some courts erroneously believe that the time that such transfer "takes effect between the transferor and the transferee" is when

the check is delivered. *Compare Dickenson v. Owens-Corning Fiberglass Corp. (In re Insulation Materials, Inc.)*, 47 Bankr. 832, 834-35 (Bankr. E.D. Tenn. 1985); with, *Eisenberg v. J L International, Ltd., supra*, 47 Bankr. at 407. However, there is no time earlier than the time of honor at which the transfer takes effect since, as Section 3-409(1) of the U.C.C. clearly provides, no legal or equitable assignment of funds in the hands of the drawee is made by delivery of a check. *See also*, Countryman, *Voidable Preference*, at 762-63; and, Official Comment to U.C.C. § 3-409 at ¶1 ("a check . . . does not of itself operate as an assignment in law or equity").

Since the date the transfer takes effect between the transferor and transferee and the date of perfection are the same in cases of transfers by check, namely, the date the check is honored, the transfer is made for Section 547(b) purposes upon the date of honor. 11 U.S.C. § 547(e)(2)(A).

3. THE SECTION 547(e) ANALYSIS IS NOT LIMITED TO LIENS AND SECURITY INTERESTS.

Although there is disagreement as to the result reached by applying Section 547(e) to the Question Presented, both parties agree that Section 547(e) is controlling. *See* Brief of Petitioner at 15-16. As Petitioner correctly notes, many courts have dismissed Section 547(e) as being merely applicable to security interests based upon, among other things, their reading of the legislative history. *See, e.g., Durham v. Smith Metal and Iron*

Co. (In re Continental Commodities, Inc.), 841 F.2d 527, 530 (4th Cir. 1988), citing S. Rep. No. 989, *supra*, at 89.

As discussed above, the clear, unequivocal language of Section 547(e)(2) declares that it defines when a transfer is made "for purposes" of Section 547. There is no ambiguity in that provision. Accordingly, in interpreting Section 547(e) reference to the legislative history is unnecessary. *Toibb v. Radloff*, ___ U.S. ___, 111 S.Ct. 2197, 2200 (1991), citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984). However, if anything, the legislative history actually supports the application of Section 547(e) to this analysis. The first sentence of Senate Report 989 regarding Section 547(e) states that "[s]ubsection (e) determines when a transfer is made for purposes of the preference section." S. Rep. No. 989, *supra*, at 89, *reprinted in Collier, supra*, App. 3 at V-89.

The Fourth Circuit and other courts misread the last provision in that legislative history relating to subsection (e), which provides:

> Subsection (e) is designed to reach a different result under the 1962 version of Article 9 of the U.C.C. and under the 1972 version because different actions are required under each version in order to make a security agreement effective between the parties.

Id. Those courts construe this provision to limit the application of Section 547(e)(1)(b) to security interests. *See Durham v. Smith Metal and Iron Co., supra*, 841 F.2d at 530. This view clearly ignores the analytical process mandated in Section 547(e) (i.e. beginning under 547(e)(2), proceeding to (e)(1) and, as appropriate, referring to (e)(3)). Additionally, this provision of the legislative history does

not exclude other types of transfers from subsection (e). Instead, it simply clarifies that the Senate actually intended different results under subsection (e) depending upon which version of Article 9 of the U.C.C. is applied.

C. THE EXPRESS PROVISIONS OF SECTION 547(b) AND APPLICABLE STATE LAW DEMAND THAT THE DATE OF HONOR BE RECOGNIZED AS THE DATE A TRANSFER BY CHECK IS MADE.

Subject to limitations not relevant to this case, a trustee is entitled to avoid as a preference "any transfer of an interest of the debtor in property made on or within 90 days before the date of filing of the petitioner." 11 U.S.C. § 547(b)(4). Petitioner addresses this provision by arguing that, under the broad definition of "transfer" contained in the Bankruptcy Code, the delivery of a check creates a conditional cause of action against the drawer upon delivery, so that a transfer, however conditional, has been effectuated. Brief of Petitioner at 17-18 and 20-22. Petitioner concludes:

> Requiring that the check be honored by the drawee bank before a transfer will be deemed to have occurred requires that the transfer be absolute. The date of honor rule, then, effectively reads a limitation into the definition of 'transfer' contrary to express legislative intent to remove all limiting language from the definition of transfer in the Bankruptcy Code.

Id. at 22. The Trustee concedes that the definition of "transfer" as found in the Bankruptcy Code is expansive.

See id. at 21. However, that definition is not dispositive of this case.

Utilizing only this broad definition of transfer, the delivery of a check on or within 90 days of the bankruptcy filing probably would constitute a preference since, pursuant to state law, that delivery creates a contingent cause of action against the drawer. U.C.C. § 3-413(2). However, the reach of Section 547(b) is expressly limited to transfers of "an interest of the debtor in property." *Begier, supra,* 110 S.Ct. at 2263.[8] Thus, Congress has limited the application of the definition of transfer within Section 547.

In *Begier,* this Court determined that this limiting language in Section 547(b) is "coextensive with 'interest of the debtor in property' as that term is used in § 541(a)(1)." 110 S.Ct. at 2263, n. 3. Thus, in order to determine the extent of this limitation, this Court concluded that "we must turn to § 541, which delineates the scope of 'property of the estate' and serves as the post-petition analog to § 547(b)'s ['interest of the debtor in property']." *Id.* at 2263. The clear command of Section 547(b) is to determine what interests in property a debtor held at the beginning of the 90th day prior to the filing of the bankruptcy petition and what property he acquired within that 90 day period, and to then scrutinize all transfers of such interests in property within that time frame as potential preferences.

[8] In *Begier,* this court considered Section 547(b) as it existed prior to the 1984 amendments. In that version of the Bankruptcy Code, Section 547(b) was limited to transfers of "property of the debtor" rather than "an interest of the debtor in property." 110 S. Ct. at 2263. However, this Court also expressly addressed the 1984 amendments which deleted the "property of the estate" language and replaced it with the current "interest of the debtor in property" language. This Court noted approvingly the Senate Report which described this "as a 'clarifying change.'" *Id.* at 2263, n. 3, quoting S. Rep. No. 98-65, p. 81 (1983). As this amendment had the effect of providing mirror language in Section 541(a)(1) and Section 547(b), *Begier* is controlling.

Utilizing Section 541(a) as a model, the relevant interests of the debtor in property would include "all legal or equitable interests of the debtor in property as of the commencement of the" 90 day period immediately preceding the filing of the debtors' bankruptcy petition. *See* 11 U.S.C. § 541(a)(1).[9] This provision is to be construed "as a definition of what is included in the estate, rather than as a limitation." *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 203 (1983).

"Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner v. United States,* 440 U.S. 48, 54 (1979) (footnote omitted). Although *Butner* was decided under the former Bankruptcy Act, it remains persuasive under the Bankruptcy Code since Congress has made no further effort to define the extent of property rights. Indeed, as the legislative history of Section 541 indicates, the Bankruptcy Code retains Bankruptcy Act concepts on this point:

[9] Section 541(a)(1) excludes the items identified in Section 541(b) and (c)(2). There is nothing in the Trustee's proposed Second Amended Complaint, the allegations of which are taken to be true for purposes of this appeal, which would suggest the applicability of any of these exceptions.

> 'The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property including tangible or intangible property, causes of action (*See* Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section of the Bankruptcy Act.'

United States v. Whiting Pools, Inc., supra, 462 U.S. at 205 n. 9, quoting H.R. Rep. No. 95-595, p. 367 (1977); S. Rep. No. 95-989, p. 82 (1978).

Until a check is honored, a debtor retains any funds which will be used to pay the check in his account. Upon the filing of a bankruptcy petition, a trustee or debtor-in-possession would clearly have the power to stop payment of all checks drawn on the debtor's bank accounts, thus preserving those funds for the estate. Upon dishonor, the payee would have a claim against the estate based upon either the check, which claim would certainly be a general unsecured claim, or the underlying obligation. U.C.C. § 3-802(1)(b). Thus, in this case, the Debtors clearly had the power under U.C.C. § 4-403 to stop payment on the check at issue between the time of delivery and the time of honor thereby preventing a transfer of interest of the Debtors in property to Petitioner.[10]

However, Petitioner contends that the relevant transfer occurs at delivery since delivery of a check constitutes

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[10] *See also* Official Comment to U.C.C. § 4-303, at ¶ 1 (indicating that the receipt by the drawee of notice that the customer has filed a petition in bankruptcy is "legal process" requiring the drawee to stop payment on all checks drawn on the account).

a transfer within the meaning of Section 101(48). Specifically, Petitioner focuses on the secondary, conditional liability of the drawer in the event of dishonor as creating a transfer in property. *See* Brief of Petitioner at 18, citing U.C.C. § 3-122. This analysis ignores that no interest of the Debtor in property is transferred upon delivery of a check.

Under applicable state law, there are numerous reasons why a check otherwise properly payable which is delivered to a creditor may not be honored so that there are never any funds transferred to the creditor.[11] While delivery of a check may constitute a "transfer" as that term is broadly defined in 11 U.S.C. § 101(48), it cannot constitute an avoidable transfer of the interest of the debtor in property even if delivery occurs in the 90 day preference period since no funds of the debtor have been transferred to the benefit of that creditor.

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[11] Those reasons include: (1) the drawer does not have sufficient funds to cover the check, *Port City State Bank v. American National Bank,* 486 F.2d 196 (10th Cir. 1973); (2) the drawer timely delivered a stop payment order to the drawee, *Ward v. Federal Kemper Insurance Co.,* 62 Md.App. 351, 489 A.2d 91, 94 (1985); (3) the drawer closed the account on which the check is drawn, *id.* at 94; (4) the bank is timely served with a writ of garnishment, *Gelco Corp. v. United National Bank, supra,* and U.C.C. § 4-303; (5) the account is seized in a civil forfeiture action, *United States v. $4,255,000, supra;* (6) one of the drawers dies, *Cirar v. Bank of Hartshorne,* 567 P.2d 96 (Okla. 1977); (7) setoff by the drawee bank, *see* U.C.C. § 4-303; (8) for any other reason deemed sufficient by the drawee, *First American National Bank v. Commerce Union Bank,* 692 S.W.2d 642, 647 (Tenn. Ct. App. 1985); and, (9) for "no reason at all," *id.* at 647.

The mere delivery of a check does not deplete the assets in the estate available to the remaining unsecured creditors. Indeed, it makes no sense to avoid the delivery of a check since, if it is not honored, the check itself merely creates a general unsecured claim in the payee. If a trustee successfully avoided such a "transfer," she would recover no assets for the estate and the payee would still be able to file a general unsecured claim based on the avoided transfer. *See* 11 U.S.C. § 502(d) (providing that the claim of a recipient of a preferential transfer should be disallowed unless the transferee pays the amount or turns over the property subject to avoidance); and, Bankr. R. Pro. 3002(c)(3) (providing that in Chapter 7 and 13 cases, a general unsecured claim "arises in favor of" a person against whom a final judgment avoiding a transfer is taken for the amount avoided and permitting the filing of a proof of claim in that amount for a certain period of time irrespective of the claims bar date).

The demonstrably better view is that, where a check is involved, the transfer of an interest of the debtor in property occurs only when the check is honored. In virtually every context, including Section 547(b), "[t]he delivery of a check is at best of limited functional significance." *United States v. Forcellati, supra,* 610 F.2d at 31 (criminal case). Accordingly, the date of honor is the date on which the avoidable transfer is "made" for purposes of Section 547(b).

III. THE LEGISLATIVE HISTORY RELIED UPON BY PETITIONER IS IRRELEVANT TO THE QUESTION PRESENTED.

The primary reason advanced by Petitioner for overturning the decision of the Tenth Circuit is that legislative

history supposedly supports a date of delivery rule. Brief of Petitioner at 14-15. Petitioner bases his argument on the language of the report of the House Committee on the Judiciary which refers to a check as " 'a credit transaction' " and the later statements of Representative Edwards and Senator DeConcini which supposedly "contradicted" the House Report by indicating that " 'a check is equivalent to a cash payment.' " *Id.* at 14-15 and n. 3; *quoting,* H.R. Rep. No. 595, 95th Cong., 1st Sess. 373, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6329; 124 Cong. Rec. H 11097 (daily ed. Sept. 28, 1978), *reprinted in Collier, supra,* App. 3 at IX-102; and, 125 Cong. Rec. S 17414 (daily ed. Oct. 6, 1978), *reprinted in Collier, supra,* App. 3 at X-29. While Petitioner acknowledges that the statements of Representative Edwards and Senator DeConcini limited the application of the date of delivery rule to Sections 547(c)(1) and (2), he would have this Court extend that rule since "there is nothing in the legislative history indicating congressional intent that a different rule should apply to Section 547(b)." Brief of Petitioner at 15.

First, it is not even necessary to quarrel with Petitioner's interpretation of this legislative history.[12] In

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[12] Professor Countryman, for one, certainly would disagree with the formulation that the floor managers "contradicted" the House Report. He contends that they "attempted to clear up the confusion" created by that Report where it refers to checks as credit transactions, when only post-dated checks create an extension of credit, and the reference to the thirty day period of Section 3-503, which is irrelevant to the issues at hand. Countryman, *Voidable Preference, supra,* at 761. However,

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interpreting statutes, an analysis must begin with a determination of what the statutory language says. *Toibb v. Radloff, supra*, 111 S.Ct. at 2200, *quoting Blum v. Stenson, supra*, 465 U.S. at 896. As is demonstrated above, the language of Section 547 is clear and requires reference to equally clear state law applicable to this issue. "Thus, although a court may appropriately refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here." *Toibb v. Radloff, supra*, 111 S.Ct. at 2200.

Second, where the legislative history can be considered, as in *Toibb*, "the scant history on this precise issue does not express 'clearly expressed legislative inten[t] . . . contrary . . . ' to the plain language of" subsections (b) and (e). *Id.* at 2200, *quoting Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980).

The only "clearly expressed" legislative intent is with respect to Section 547(c)(1) and (2), which provisions are not at issue in this appeal. Representative Edwards and Senator DeConcini expressly limited their comments to those two paragraphs.[13] The statement in the House

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these comments "only compounded [the confusion] and extended it also to Section 547(c)(2)." *Id.* Petitioner's citation to this article in support of the transfer on delivery rule is perplexing given Professor Countryman's critical tone and conclusion that "the transfer occurs when and if the drawee bank honors the check." *Id.*

[13] Indeed this limitation also can be implied from this legislative history. The comments of Representative Edwards and Senator DeConcini are taken from extensive and nearly

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Report which they were correcting was clearly limited to Section 547(c)(1). Petitioner's view of those comments holds the two floor managers to the unreasonably high standard of having to negate expressly that which they have negated by omission. *See Johnson v. Home State Bank*, ___ U.S. ___, 111 S.Ct. 2150, 2156 (1991) (indicating that "expressly enumerated exceptions [are] presumed to be exclusive").

The legislative history does not address the precise issue in the Question Presented. The plain language of Section 547(b) and (e), together with reference to applicable state law (which reference the legislative history supports), clearly mandates a date of honor rule. Any attempt to boot-strap legislative comments made in context of and expressly limited to other statutory subsections to the issue at hand clearly is inappropriate.

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identical statements regarding the version of the Bankruptcy Reform Act of 1978 that emerged from Conference Committee. *Compare* 124 Cong. Rec., *supra*, H 11089-115, with 125 Cong. Rec., *supra*, S 17406-32. In those statements, the two floor managers exhaustively treated the numerous revisions to the pending bill and to the prior legislative history down to some very minute details. If there had been any intent to extend a transfer on delivery approach any further beyond subsection (c)(1) than subsection (c)(2), these carefully crafted statements clearly could have included the extra clause or sentence necessary to express such an intent. The silence as to Section 547(b) should be fatal to Petitioner's position.

IV. POLICY ARGUMENTS SUPPORT THE CONCLUSION THAT A TRANSFER BY CHECK OCCURS WHEN THE CHECK IS HONORED.

Petitioner identifies four relevant congressional policies underlying Section 547: equality of distribution among similarly situated creditors; conformity with the U.C.C.; conformity with "commercial practice"; and, establishment of uniform bankruptcy laws. Brief of Petitioner at 11, 16-17 and 19. For purposes of Section 547(b), the first two policies clearly support a transfer on date of honor rule; the third policy, when understood in its proper statutory context, is irrelevant to Section 547(b); and, the fourth policy does not affect the analysis of the Question Presented.

A. THE POLICY OF EQUALITY OF DISTRIBUTION IS FURTHERED BY TRANSFER ON DATE OF HONOR RULE.

As previously noted, the primary policy of the entire Bankruptcy Code is to promote equality of distribution among similarly situated creditors. *Begier, supra,* 110 S.Ct. at 2262. In order to facilitate that policy, Congress provided trustees with the power to avoid preferential transfers of an interest of the debtor in property. 11 U.S.C. § 547(b). Upon discharging his burden of establishing the elements contained in Section 547(b), and subject to a defendant's ability to attempt to establish one of the exceptions contained in Section 547(c), a trustee is entitled to recover the interest of the debtor in property transferred. The recovered interest of the debtor in property then becomes part of the Bankruptcy Estate and is

administered for the benefit of the creditors pursuant to the priorities established by Congress. *See* 11 U.S.C. § 507 (setting forth distribution priorities).

Under this regime, the only conceivable relevance that delivery of a check might have is that it might enable the payee, upon appropriate presentment, to receive funds from the drawee bank which would have otherwise been available for the benefit of the other creditors. However, the delivery of a check does not transfer an interest of the debtor in property. Avoidance of whatever transfer may occur when a check is delivered would be a futile act since the Trustee recovers no assets for the estate and the defendant is able to then file a claim for the avoided obligation. *See* discussion at 21-26, *supra.*

The only time a payee of a check is preferred within the meaning of Section 547 vis-à-vis the other creditors is when the check is honored. At that time the funds available to the debtor from the drawee bank are depleted and the goal of equality of distribution among similarly situated creditors is thwarted.

B. THE DATE OF HONOR RULE CONFORMS WITH THE UNIFORM COMMERCIAL CODE.

As discussed above, Section 3-409(1) of the U.C.C. is the operative provision to the Question Presented and clearly provides that a payee does not obtain an interest in any funds which may be available to pay the check unless and until it is accepted by the drawee bank. *See* discussion at 16-19, *supra.* Accordingly, the transfer on

date of honor approach advocated by the Trustee best effectuates the congressional policy of bringing bankruptcy preference law "more into conformity with . . . the Uniform Commercial Code." H.R. Rep. No. 595, *supra*, at 372, *reprinted in Collier, supra*, App. 2 at II-372. Petitioner concedes this point. *See* Brief of Petitioner at 20.

C. COMMERCIAL EXPECTATIONS ARE NOT CLEARLY DEFINED AS TO THE QUESTION PRESENTED AND, IN ANY EVENT, SHOULD BE ADDRESSED IN SECTION 547(c) IF IN CONFLICT WITH THE U.C.C.

Congress clearly identified bringing preference law "more into conformity with commercial practice" as a goal in enacting Section 547. H.R. Rep. No. 595, *supra*, at 372, *reprinted in Collier, supra*, App. 2 at II-372. However, Section 547(b) makes no distinction between those transfers which are commercial in nature and those which are noncommercial. All transactions involving checks, whether entered into in commercial or noncommercial settings, are governed by the provisions of the U.C.C.

In comments limited to subsection (c)(1) and (2), Representative Edwards and Senator DeConcini indicate that a check is a cash transaction. *See* discussion at 26-29, *supra*. It is this legislative history which is apparently the genesis of the view of certain courts that under commercial practice a transfer by check is customarily the date of transfer. *See Young Supply Co. v. McLouth Steel Corp.*, 55 Bankr. 356, 357 (E.D. Mich. 1985), citing *Shamrock Golf Co.*

v. Richcraft, Inc., supra, (which in turn cites the "cash payment" comments by Representative Edwards and Senator DeConcini).

Any categorical statement that commercial practice is to treat a check as a cash transaction is erroneous. There are clearly instances in the commercial world where a check is not viewed as cash and, consequently, is unacceptable as payment. For example, under New Mexico law, title insurance cannot be issued upon delivery of a check drawn on an account of a customer. § 59A-30-5.1 N.M.S.A. 1978 (1991 Supp.)

Additionally, certain Section 547(c) exceptions embody a policy of encouraging trade creditors to deal with troubled businesses. *Bernstein v. RJL Leasing, supra,* 799 F.2d at 634; *Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.),* 850 F.2d 1275, 1280 (8th Cir. 1988). While such creditors may well derive some comfort from certain protections afforded under preference law, such as the ordinary course of business exception codified in Paragraph (c)(2), common sense would certainly suggest that not all such creditors view checks from the troubled businesses as payment upon delivery.

However, to the extent that in commercial settings the expectation is that sometimes payment occurs on delivery, those expectations can best be fulfilled by the Section 547(c) exceptions. Assuming that the comments of Representative Edwards and Senator DeConcini control, a creditor who takes a check for goods delivered or services rendered to a debtor can do so without concern that any vagaries in the bank collection process may result in the

transaction being removed from the safe harbor of the substantially contemporaneous exchange exception found in Paragraph (c)(1).[14]

D. THE POLICY OF HAVING UNIFORM BANKRUPTCY LAWS HAS NOTHING TO DO WITH THE QUESTION PRESENTED.

Petitioner mistakes Congress' ability to promulgate uniform bankruptcy laws and to mandate uniform results for all questions which may come up under bankruptcy laws, with the question of whether Congress has chosen to so exercise its powers as to the Question Presented. *See Butner v. United States, supra,* 440 U.S. at 54. As demonstrated above, Congress exercised its power to create uniform bankruptcy laws to fashion areas of inquiry as to when a transfer is made, but left to state law the ultimate resolution of those questions. Indeed, the legislative history makes clear that Congress contemplated, at least to security interests, that different transfer dates would result depending upon which version of Article 9 of the U.C.C. was applied. S. Rep. No. 989, *supra,* at 89.

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[14] As the issue is not before the Court, the Trustee assumes that the date of delivery would control for the (c) exceptions identified by Representative Edwards and Senator DeConcini. The Trustee does not suggest that this legislative history, even in the context of the specifically identified (c) exceptions, is any substitute for statutory construction, but does note that the result achieved by the date of delivery rule may be able to be reached by close scrutiny of the provisions of those (c) exceptions.

Clearly uniform results under the Bankruptcy Code are not mandated in situations where Congress has left state law to have a controlling influence on the outcome. *Butner v. United States, supra,* 440 U.S. at 54-55. Indeed, in such situations where the outcome may vary depending upon the law of the state, the failure to reach uniform results under the Bankruptcy Code "serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy' ". *Id.* at 55, quoting *Lewis v. Manufacturers National Bank,* 364 U.S. 603, 606 (1961).

V. THE EASE OF PROOF AND MANIPULATION FACTORS SUPPORT THE TENTH CIRCUIT'S DECISION.

The Trustee is in complete agreement that the ease of proof and manipulation considerations enunciated by the Tenth Circuit in its decision below are no substitute for statutory construction in determining the outcome of this case. *See* Brief of Petitioner at 22-23. Indeed, the Trustee would be most surprised if the Tenth Circuit viewed these factors as determinative. The Tenth Circuit, in discussing these factors, was responding to the Sixth Circuit's similar discussion when advocating a date of delivery rule. *Compare* (App. to Petition at 10A-11A); with, *Official Unsecured Creditors Committee v. Shaler Corp. (In re Belknap, Inc.),* 909 F.2d 879, 882 (6th Cir. 1990).

However, Petitioner's criticisms of the Tenth Circuit's treatment of the manipulation points are not well

founded. Petitioner's first contention is that the ability to manipulate the date of transfer is not relevant since the date of honor can be manipulated by "a knowledgeable debtor." Brief of Petitioner at 23. Petitioner's argument seems to be essentially that since the date of transfer can be manipulated under either rule, manipulation cannot be a factor. However, Petitioner does not directly quarrel with the Tenth Circuit's sensible conclusion that a date of honor is less subject to manipulation than a date of delivery rule. *See also Kupetz v. Elaine Monroe Associates, Inc., supra,* 825 F.2d at 202 (acknowledging the propensity for abuse under the date of delivery approach).

Petitioner then adopts the Sixth Circuit's puzzling contention that under a date of honor rule a drawee bank "which is also a creditor and which has inside knowledge of the debtor's financial condition" can manipulate the date of transfer under a date of honor rule "thereby bringing transactions within a 90 day period that ordinarily would not have constituted preferential transfers." Brief of Petitioner at 23, citing *Official Unsecured Creditors Committee v. Shaler Corp., supra,* 909 F.2d at 882. First, the Trustee has substantial reservations about imputing this sort of prescience to drawee banks. The Trustee submits that even with "inside knowledge" there are very few such drawee banks that will know the exact date which the debtor will file its bankruptcy petition more than 90 days prior to the filing and thereby have any ability to predict what transfers can be delayed so as to be brought within the 90 day period.

Second, even assuming such foreknowledge, such a bank would almost certainly setoff against the debtor's account, thereby capturing all of the funds in the account

available to pay its debt rather than paying the money to a third party. By manipulating the date of transfer as Petitioner suggests, a bank merely would be creating the potential that the transfer would be avoided as a preference and, if that potential was realized, would share any funds recovered on a pro rata basis with other unsecured creditors. Surely any bank that would engage in such devious tactics would attempt to obtain the full benefit of those funds through setoff rather than magnanimously creating a situation where it might share those funds pro rata with other creditors if those funds were ever recovered.

Finally, the Sixth Circuit's approach completely ignores the drawee bank's legal responsibility to pay an item presented by the "midnight deadline" unless the drawee bank has returned the item or sent written notice of dishonor or nonpayment. U.C.C. §§ 4-301 (setting forth the drawee's responsibility) and 4-104(h) (defining the midnight deadline as "midnight on [the bank's] next banking day following the banking day on which it receives the relevant item"). The only excuses for delay are expressly set forth in U.C.C. Section 4-108. Thus, even if a drawee bank had the knowledge and inclination necessary to manipulate the date of transfer to create a preference, any payment delayed beyond the midnight deadline renders the bank liable for the amount of the item unless it has some valid defense. U.C.C. § 4-302(a). *See also* 12 U.S.C. § 4002 (containing the expedited funds availability schedules).

Overall, although perhaps not foolproof, a date of honor approach is much better suited to prevent manipulation of the date of transfer than a date of delivery approach.

CONCLUSION

All formulations of the date of delivery approach of which the Trustee is aware concede the necessity of the check being honored. For instance, although not clearly articulated, Petitioner would apparently have this Court adopt the position that a transfer occurs on delivery "if the check is ultimately honored." Brief of Petitioner at 21. Thus, whatever legal significance a date of delivery may have or may acquire once the check is honored, no transfer of an interest of a debtor in property is made unless and until the check is honored.

The decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

IN RE ALAN J. and MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE & SUPPLY, a general partnership, and MORRIS R. ANTWEIL,

Debtors.

WILLIAM BARNHILL,

Petitioner,

v.

ELLIOT JOHNSON, Trustee,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE QUESTION PRESENTED IS A QUESTION OF FEDERAL LAW REQUIRING STATUTORY CONSTRUCTION 3

II. STATUTORY CONSTRUCTION OF SECTION 547 SUPPORTS A DATE OF DELIVERY RULE 4

A. "EFFECTIVE TRANSFER" UNDER 547(e) IS BETWEEN TRANSFEROR AND TRANSFEREE RATHER THAN THE BANK 5

B. BETWEEN TRANSFEROR AND TRANSFEREE THE TRANSFER IS EFFECTIVE UPON DELIVERY OF THE CHECK 7

III. A DATE OF DELIVERY RULE FURTHERS UNIFORM APPLICATION OF THE BANKRUPTCY CODE AND POLICIES 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Begier v. Internal Revenue Service, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990) 11

Blum v. Stenson, 465 U.S. 886, 894-95, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984) 4, 7

Butner v. United States, 440 U.S. 48, 54-55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979) 5

Corn Exchange National Bank and Trust Co. v. Klauder, 318 U.S. 434, 436-37, 63 S.Ct. 679, 681, 87 L.Ed. 884 (1943) 6

McKenzie v. Irving Trust Co., 423 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945) 2, 3, 5

Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n., ___ U.S. ___, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95 (1991) 3

FEDERAL CASES

Braniff Airways, Inc. v. Midwest Corp., 873 F.2d 805 (5th Cir. 1989) 5

Durham v. Smith Metal & Iron Co. (In re Continental Commodities, Inc.), 841 F.2d 527 (4th Cir. 1988) 5

Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.), 909 F.2d 879, 881-82 (6th Cir. 1990) 3

Yellowhouse Machinery Co. v. Mack (In re Hughes), 704 F.2d 820, 822 (5th Cir. 1983) 11

TABLE OF AUTHORITIES – Continued

Page

NEW MEXICO CASES

Regents of University of New Mexico v. Lacey, 107 N.M. 742, 743-44, 764 P.2d 873, 874-75 (1988) 9, 10

State v. Archuleta, 82 N.M. 378, 381-82, 482 P.2d 242 (Ct. App.), *cert. denied*, 82 N.M. 377, 482 P.2d 241 (1971) 10

OTHER JURISDICTIONS

Harper v. K.N.W. Trucking Co., 725 P.2d 1066 (Alaska 1986) 9

In re Foreclosure of First Resort Properties, Inc., 94 N.C.App. 99, 380 S.E.2d 124 (Ct. App. N.C. 1979) 9

Ivy v. American Road Ins. Co., 409 So.2d 549, 550-52 (La. 1981) 9

Lakeway Co. v. Bravo, 576 S.W.2d 926 (Ct.App. Tex. 1979) 9

R & S Investment v. Howard, 95 Nev. 279, 593 P.2d 53 (Nev. 1979) 9

Spencer v. West Alabama Properties, Inc., 564 So.2d 425, 426-28 (Ala. 1990) 9

Terry v. Kemper Ins. Co., 390 Mass. 450, 456 N.E.2d 465 (1983) 9

STATUTES

11 U.S.C. § 547 ..... 1, 3, 4, 11, 12, 13

11 U.S.C. § 547(b) ..... *passim*

11 U.S.C. § 547(b)(4)(A) 12

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 547(b)(5) 6

11 U.S.C. § 547(c) 12

11 U.S.C. § 547(e) 1, 5, 10

11 U.S.C. § 547(e)(1) 4

11 U.S.C. § 547(e)(1)(B) 5

11 U.S.C. § 547(e)(2) 1

11 U.S.C. § 547(e)(2)(A) 4, 5, 7, 11

11 U.S.C. § 547(g) 12

N.M. Stat.Ann. 1978, § 55-1-105 (Cum. Supp. 1991) 9

UNIFORM COMMERCIAL CODE

U.C.C. § 3-409 ..... 1, 4, 6

U.C.C. § 3-802 8

LEGISLATIVE HISTORY

124 Cong. Rec. H11097 (Daily Ed. Sept. 28, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at IX-102 (15th Ed. 1991) 8

125 Cong. Rec. S17414 (Daily Ed. Oct. 6, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at X-29 (15th Ed. 1991) 8

H.R. Rep. No. 595, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963 ..2, 11

TABLE OF AUTHORITIES – Continued

Page

S.Rep. No. 989, 95th Cong., 2nd Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at V-1 (15th Ed. 1991) 2

S.Rep. No. 1106, 95th Cong., 2d Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at VI-1 (15th Ed. 1991) 3, 11, 12

MISCELLANEOUS AUTHORITY

Countryman, *The Concept of a Voidable Preference*, 38 Vand.L.Rev. 713, footnote 158 (1985) 6

SUMMARY OF THE ARGUMENT

The Bankruptcy Code is a comprehensive federal statutory framework for debtor relief. The question presented in this case is one dealing with a time period which is an integral part of that legislative framework, the 90-day preference period under 11 U.S.C. § 547(b). The determination of whether a particular transfer, such as the payment by check in this case, falls within or outside of the 90-day period is a question of federal law under the federal statute.

Both parties agree that the language of 11 U.S.C. § 547, by itself, does not fully resolve the question of the date of transfer where payment is by check. Respondent Trustee, however, contends that Section 547 is clear and unambiguous, and that an analysis under 11 U.S.C. § 547(e) requires reference to state law to resolve the question of the effective date of transfer. The Trustee further argues that, by referring to the Uniform Commercial Code § 3-409, the date the check is honored by the bank must apply as the effective date of transfer.

The Trustee's argument ignores the language of § 547(e)(2) that if a transfer is perfected within ten days, the transfer is deemed to have been made at the time the transfer takes effect between the transferor and the transferee. The legislative history of Section 547, modern commercial practice, the Uniform Commercial Code and state law support a conclusion that, when payment is made by check, the transfer takes effect as between the debtor/transferor and the creditor/transferee on the date the check is delivered by the debtor to the creditor.

Further, the adoption of a date of delivery rule for purposes of § 547(b) is consistent with congressional intent to create a more modern, efficient framework for debtor relief. Unlike a date of honor rule, the date of delivery rule does not modify the scope of the 90-day preference period nor limit the provisions of the Code relating to transfer. Adoption of a date of delivery rule for § 547(b) does not create inconsistencies through application of a different rule to different subsections of § 547 depending on which party bears the burden of proof. Last, a date of delivery rule is in harmony with the policies underlying the Code and the drafter's intent to conform bankruptcy practice to modern commercial practice and to create an efficient, uniform federal framework for debtor relief.

ARGUMENT

The bankruptcy laws are a complex, comprehensive statutory framework for debtor relief which were intended to have uniform application throughout the United States. *McKenzie v. Irving Trust Co.*, 423 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945); H.R. Rep. No. 595, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963. The Bankruptcy Reform Act of 1978 was enacted to modernize the bankruptcy law. S.Rep. No. 989, 95th Cong., 2nd Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at V-1 (15th Ed. 1991). The overall objectives of the Bankruptcy Code are to give the debtor a less encumbered "fresh start" after bankruptcy, to make bankruptcy procedures more efficient, and to balance more equitably the interests of

different creditors. S.Rep. No. 1106, 95th Cong., 2nd Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at VI-1 (15th Ed. 1991).

The question presented in this case is a question requiring construction of one of the provisions of the comprehensive framework of the Bankruptcy Code, the preference section in 11 U.S.C. § 547.

I. THE QUESTION PRESENTED IS A QUESTION OF FEDERAL LAW REQUIRING STATUTORY CONSTRUCTION

The Trustee contends that the provisions of 11 U.S.C. § 547 are clear and unambiguous and, therefore, there is no need for statutory construction in this case. The question presented, however, cannot be resolved based solely on the language of the statute.

The question of when a transfer occurs for purposes of an action to avoid a preference under 11 U.S.C. § 547 is a question of federal law arising under a federal statute. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990). In construing a federal statute, the initial inquiry is whether, examining the language of the statute, Congress has spoken on the subject matter. *Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n.*, ___ U.S. ___, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95 (1991). If the matter is not addressed by the plain language of the statute, then the question must be resolved by resort to sources extrinsic to the statute

itself, including the legislative history. The statute primarily should be construed to give effect to legislative intent. *Blum v. Stenson*, 465 U.S. 886, 894-95, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984).

Both sides in this case agree that the question presented cannot be resolved solely by the language of 11 U.S.C. § 547. Congress has not, in the language of the statute, itself, clearly addressed the subject matter. Therefore, the question presented by the case, the effective date of transfer when payment is by check, must be resolved by resort to sources extrinsic to Section 547, itself, including the legislative history which discloses congressional intent in enacting the statute.

II. STATUTORY CONSTRUCTION OF SECTION 547 SUPPORTS A DATE OF DELIVERY RULE

The Trustee relies primarily on the language of 11 U.S.C. § 547(e)(1) and Uniform Commercial Code (U.C.C.) § 3-409 to argue that the effective date of transfer for purposes of 11 U.S.C. § 547(b) should be the date of honor by the bank when payment is made by check. The Trustee's position that a date of honor rule should apply because, under U.C.C. § 3-409, a check does not act as an assignment of funds in the hands of the bank ignores the language of 11 U.S.C. § 547(e)(2)(A), that, if the transfer is perfected within ten days, the time of transfer relates back to the date the transfer is effective between the transferor and the transferee.

A. "EFFECTIVE TRANSFER" UNDER 547(e) IS BETWEEN TRANSFEROR AND TRANSFEREE RATHER THAN THE BANK

11 U.S.C. § 547(e) defines the time when a transfer is made.[1] Section 547(e)(2)(A) states that a transfer is made "at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within ten days after, such time." Section 547(e)(1)(B) further provides that "a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."

In cases decided under the former Bankruptcy Act, this Court has held that the nature and extent of an interest in property and whether a transfer of such an interest has been perfected are to be tested by state law. *Butner v. United States*, 440 U.S. 48, 54-55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979); *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S.Ct. 405, 407, 89 L.Ed. 305 (1945);

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[1] Many courts have held that the provisions of 11 U.S.C. § 547(e) apply only to secured transactions. *See, e.g., Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805 (5th Cir. 1989); *Durham v. Smith Metal & Iron Co. (In re Continental Commodities, Inc.)*, 841 F.2d 527 (4th Cir. 1988). This case does not involve a secured transaction, and the question of whether § 547(e) is, or is not, limited to secured transactions has not been directly raised by the Petition. It is the Petitioner, William Barnhill's position that it is not necessary to resolve the question in this case. Regardless of whether the provisions of § 547(e) are applied directly to the check transaction in this case, or, as previously argued by Petitioner, applied by analogy to a secured transaction, the provisions of § 547(e) support a date of delivery rather than a date of honor rule.

Corn Exchange National Bank and Trust Co. v. Klauder, 318 U.S. 434, 436-37, 63 S.Ct. 679, 681, 87 L.Ed. 884 (1943).

Relying on this reference back to state law for determination of the nature of an interest in property and whether a transfer has been perfected, the Trustee argues that U.C.C. § 3-409 is determinative of both the date of perfection and the date of transfer in this case. The Trustee contends that, since under U.C.C. § 3-409, a check does not constitute an assignment of funds in the hands of the bank, there has been no transfer of an interest in property nor has the transfer been perfected until the bank honors the check.[2]

Section 3-409 of the U.C.C., however, is not determinative of the question presented in this case. The Petitioner does not dispute that, at the time the bank honors the check, a creditor on a simple contract could not acquire a judicial lien superior to the interest of the payee creditor and, therefore, transfer by check would be deemed to be perfected at that point. However, U.C.C. § 3-409 does not deal with effectiveness of the transfer between the debtor and the payee creditor but, instead, deals with the bank's liability. U.C.C. § 3-409 specifically states:

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[2] The Trustee argues that because there is no assignment of funds in the hands of the bank, there is no diminution or depletion of the bankruptcy estate and, therefore, no transfer of an interest in property. Most courts have rejected the "diminution of the estate" test, holding that a voidable preferential transfer exists if the requirements of 11 U.S.C. § 547(b)(5) are met. *See* Countryman, *The Concept of A Voidable Preference*, 38 Vand.L.Rev. 713, footnote 158 (1985).

> (1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and *the drawee is not liable* on the instrument until he accepts it. (Emphasis added.)

Focusing on the provision of the U.C.C. dealing with the bank's liability and arguing that the point at which the bank becomes liable is the effective date of transfer ignores the clear language of 11 U.S.C. § 547(e)(2)(A) that, if the transfer is perfected within ten days, the time of transfer relates back to when the transfer is effective between the transferor and the transferee. As set out below, the legislative history, the realities of modern commercial practice and state law, including the provisions of the Uniform Commercial Code, demonstrate that, as between the transferor and the transferee, the transfer is effective upon delivery of the check.

B. BETWEEN TRANSFEROR AND TRANSFEREE THE TRANSFER IS EFFECTIVE UPON DELIVERY OF THE CHECK

The Trustee contends that the legislative history should be ignored in this case and that the Uniform Commercial Code and general state law establish that a date of honor rule should apply. Contrary to the Trustee's position, however, since Congress has not spoken on the question presented in the clear language of the statute, to the greatest extent possible, the statute should be construed to give effect to congressional intent as expressed in the legislative history. *Blum v. Stenson*, 465 U.S. 886,

894-95, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). Further, under the Uniform Commercial Code, modern commercial practice and state law, when payment is made by check, the transfer is effective between the transferor and transferee on the date of delivery of the check.

The intent of Congress that the effective date of transfer should be a date of delivery is set out in the Congressional Record. Both the House of Representatives and Senate statements indicated that the Congressional drafters considered the payment of a debt by means of a check to be the equivalent of a cash payment. 124 Cong. Rec. H11097 (Daily Ed. Sept. 28, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at IX-102 (15th Ed. 1991); 125 Cong. Rec. S17414 (Daily Ed. Oct. 6, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at X-29 (15th Ed. 1991).

Similarly, the Uniform Commercial Code and state law, including the law of New Mexico, recognize that, as between the drawer of a check and the payee, a debt is deemed to be paid as of the date when the drawer delivers the check to the payee.[3] Section 3-802 of the

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[3] The Trustee, in Respondent's Brief, raises a choice of law question regarding this case. (Brief for the Respondent, p.16, footnote 6). No question has previously been raised in these proceedings that the law of any state other than the State of New Mexico would apply to questions of state law in this case. It is also difficult to see how the law of any state other than New Mexico could apply. The Petitioner is a resident of New Mexico. (J.A. 21). The check at issue in this case was drawn by a New Mexico corporation on a New Mexico bank account. (J.A. 26). The check was similarly paid through a

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Uniform Commercial Code provides that unless otherwise agreed, where an instrument is taken for an underlying obligation, the obligation is *pro tanto* discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor. Based on this provision and modern commercial practice, numerous states follow the rule that, where the check is honored, as between the drawer and the payee, the date of transfer relates back to the date of delivery of the check. *See, e.g., Spencer v. West Alabama Properties, Inc.*, 564 So.2d 425, 426-28 (Ala. 1990); *Harper v. K.N.W. Trucking Co.*, 725 P.2d 1066 (Alaska 1986); *Ivy v. American Road Ins. Co.*, 409 So.2d 549, 550-52 (La. 1981); *Terry v. Kemper Ins. Co.*, 390 Mass. 450, 456 N.E.2d 465 (1983); *R & S Investment v. Howard*, 95 Nev. 279, 593 P.2d 53 (Nev. 1979); *In re Foreclosure of First Resort Properties, Inc.*, 94 N.C.App. 99, 380 S.E.2d 124 (Ct. App. N.C. 1979); *Lakeway Co. v. Bravo*, 576 S.W.2d 926 (Ct. App. Tex. 1979).

The State of New Mexico specifically follows the rule that, when a check is paid upon presentation to the drawee bank, the debt of the drawer to the payee is deemed paid as of the date when the drawer delivers the check to the payee. *Regents of University of New Mexico v. Lacey*, 107 N.M. 742, 743-44, 764 P.2d 873, 874-75 (1988).

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New Mexico bank. (J.A. 26). To the best of Petitioner's knowledge, with respect to the claims against Petitioner, there are no contacts with any state other than the State of New Mexico. *See*, N.M. Stat.Ann. 1978, § 55-1-105 (Cum. Supp. 1991), providing that the U.C.C. as adopted by New Mexico governs commercial transactions having primary contacts with New Mexico.

Even though a check does not act as an assignment of funds in the hands of the bank, as between the parties to the transaction, a check does constitute an assignment under New Mexico law. *State v. Archuleta*, 82 N.M. 378, 381-82, 482 P.2d 242 (Ct. App.), *cert. denied*, 82 N.M. 377, 482 P.2d 241 (1971). As between transferor and transferee, when payment is made by check, the transfer is effective as of the date of delivery of the check under New Mexico law. *Regents of University of New Mexico v. Lacey*, 107 N.M. 742, 743-44, 764 P.2d 873, 874-75 (1988).

Section 547(e) provides that, if perfected within ten days, the time of transfer is the date the transfer is effective between transferor and transferee. The legislative history shows clear congressional intent that payment by check is the equivalent of a cash transaction, effective as of the date of delivery of the check. Under modern commercial practice and the laws of many states, including New Mexico, a debt which is paid by check is deemed to be paid as of the date of delivery of the check from debtor to creditor. The effective date of transfer between the debtor/transferor and the creditor/transferee is the date of delivery of the check.

III. A DATE OF DELIVERY RULE FURTHERS UNIFORM APPLICATION OF THE BANKRUPTCY CODE AND POLICIES

The Trustee argues that "the primary policy of the entire Bankruptcy Code is to promote equality of distribution among similarly situated creditors." (Brief for Respondent, p.30). Petitioner does not dispute that equality of distribution is one of the policies underlying the

Code. *See, Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990). However, the Code was also enacted to create a uniform, federal framework for debtor relief which would modernize bankruptcy laws, make bankruptcy procedures more efficient and give debtors a less encumbered "fresh start." H.R. Rep. No. 595, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963; S.Rep. No. 1106, 95th Cong., 2d Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at VI-1 (15th Ed. 1991). Unlike a date of honor rule, the adoption of a date of delivery rule for Section 547(b) not only is in harmony with the policy of equality of distribution, but furthers uniform application of the bankruptcy laws in conformity with modern commercial practice.

In enacting 11 U.S.C. § 547(b), Congress drew an arbitrary 90 day "line" for avoidable preferences. Transfers which fall within the 90 day period prior to filing of the petition may be avoided, while transfers which fall outside the 90 day limit may not be avoided. *Yellowhouse Machinery Co. v. Mack (In re Hughes)*, 704 F.2d 820, 822 (5th Cir. 1983). Under the provisions of Section 547, the question of whether a transfer is within or outside the 90 day period focuses on the effective date of the transfer between debtor and creditor. 11 U.S.C. § 547(e)(2)(A). Under a date of honor rule, focus is shifted from actions between debtor and creditor to the actions of the bank, leaving the time the transfer is deemed to occur to the unpredictable process of bank collections.[4] A date of

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[4] Using a date of honor rule, it is possible that a transfer begun by the debtor prior to filing of the petition would not be

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delivery rule for Section 547(b), however, leaves intact the statutory framework of determining whether a transaction is within the 90 day time limit by focusing on the date of transfer between debtor and creditor. A date of delivery rule preserves the scope of the 90 day period enacted by Congress, in harmony with congressional policy of equality of distribution among creditors.

A date of delivery rule also furthers congressional intent to enact a uniform bankruptcy law with more efficient bankruptcy procedure. S.Rep. No. 1106, 95th Cong., 2d Sess. 1 *reprinted in* Collier on Bankruptcy, App. 3 at VI-1 (15th Ed. 1991). Adoption of a date of honor rule for the trustee's avoidance power in Section 547(b), while a date of delivery rule applies to the exceptions to those powers under Section 547(c) would result in a trustee having to prove the voidability of a transfer using one date, while a creditor would be required to prove the transfer is not voidable based on a different date. 11 U.S.C. § 547(g). Adoption of the date of delivery would create a singular rule for all of the provisions of 11 U.S.C. § 547, rather than a shifting rule based on the party bearing the burden of proof, thus advancing the congressional purposes of a uniform law with more efficient procedures.

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deemed to be effective until after filing if the bank honors the check without notice of the bankruptcy. The transfer, then, could no longer be a voidable preference made "on or within 90 days before the date of filing of the petition." 11 U.S.C. § 547(b)(4)(A).

The adoption of the date of delivery as the effective date of transfer when payment is made by check is consistent with congressional intent and furthers the policies underlying the Bankruptcy Code.

CONCLUSION

The legislative history of Section 547, modern commercial practice and state law, including the law of the State of New Mexico, recognize that, where a debt is paid by check, the effective date of transfer as between the debtor and creditor is the date of delivery of the check. It was clearly Congressional intent that the date of delivery rule apply to transfers under 11 U.S.C. § 547(b). The adoption of a date of delivery rule for § 547 is in harmony with Congress' adoption of a specific 90 day time after which a transfer of interest of the debtor in property would be deemed to be a preference. A date of delivery rule, unlike a date of honor rule, does not alter or modify the legislative framework created by the Bankruptcy Code. Further, a date of delivery rule furthers uniform consistent application of the provisions of the Bankruptcy Code across the United States, avoiding conflicting application of different rules for different subsections of § 547.

Therefore, the Petitioner, William Barnhill, would respectfully request that the Court adopt a date of delivery rule for purposes of 11 U.S.C. § 547(b), and reverse the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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